FILED

No. 981620 APR 7 1999

OFFICE OF THE CLERK

# In The Supreme Court of the United States

## October Term 1998

# In Re: JOSEPH D. MORRISSEY,

*Petitioner,*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## Petition for Writ of Certiorari

**Rodney A. Smolla**
*Counsel of Record*
**T.C. WILLIAMS SCHOOL OF LAW**
**University of Richmond**
**Richmond, Virginia 23173**
**(804) 289-8197**

*Counsel for Petitioner*

**David B. Hargett**
**MORRISSEY, HERSHNER & JACOBS**
**Seven South Adams Street**
**Richmond, Virginia 23220-5601**
**(804) 788-1956**

*Counsel for Petitioner*

**Everette G. Allen, Jr.**
**HIRSCHLER, FLEISCHER, WEINBERG, COX & ALLEN**
**The Federal Reserve Building**
**701 East Byrd Street**
**Post Office Box 500**
**Richmond, Virginia 23219**
**(804) 771-9500**

*Counsel for Petitioner*

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

8488

## QUESTION PRESENTED FOR REVIEW

1. Whether the First Amendment permits the imposition of criminal contempt convictions against an attorney for violating a Federal District Court rule prohibiting any expression of opinion as to the merits or evidence in a pending criminal proceeding, or any comment on the identity, testimony, or credibility of a prospective witness, if such statements would pose a "reasonable likelihood" of interference with a fair trial, or whether instead the higher "substantial likelihood of material prejudice" standard approved by this Court in *Gentile v. State Bar of Nevada* establishes the minimum constitutional standard applicable to extrajudicial statements by attorneys?

## LIST OF PARTIES

All parties to this proceeding appear in the caption of the case, and no parent corporations or subsidiaries exist in this litigation.

**TABLE OF CONTENTS**

QUESTION PRESENTED FOR REVIEW ..... i

LIST OF PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... vii

OPINIONS BELOW ..... 1

STATEMENT OF JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED ..... 1

STATEMENT OF THE CASE ..... 1

A. Introduction ..... 1

B. Statement of Facts ..... 2

C. Local Rule 57 ..... 3

D. Judgments Below ..... 4

REASONS FOR GRANTING THE WRIT .....6

I. THE "REASONABLE LIKELIHOOD OF INTERFERENCE" STANDARD ESTABLISHED IN THE RULING BELOW CONFLICTS WITH THE "SUBSTANTIAL LIKELIHOOD OF MATERIAL PREJUDICE" STANDARD APPROVED IN *GENTILE V. STATE BAR OF NEVADA*, AND IF PERMITTED TO STAND, WILL ALLOW FEDERAL COURTS TO DISCIPLINE ATTORNEYS UNDER THE APPLICATION OF A STANDARD THAT VIOLATES THE FIRST AMENDMENT. .....6

A. The Reasonable Likelihood Standard is Significantly Less Protective Than the Substantial Likelihood of Material Prejudice" Test Approved in *Gentile*.....6

B. The Courts Below Acknowledged that the Reasonable Likelihood Standard was Lower than Substantial Likelihood of Material Prejudice Standard. .....10

C. This Court in Gentile Observed that the Reasonable Likelihood Standard was Less Protective than the Substantial Likelihood of Material Prejudice Standard. .....11

D. The "Substantial Likelihood" Standard Approved in *Gentile* Was Intended by this Court to Set the Constitutional Floor, Invoking an Intermediate Scrutiny Standard Deliberated Calculated to Provide Greater Protection than Mere "Reasonableness" or "Rational Basis" Formulations. .....12

E. In Holding that the Reasonable Likelihood Standard Was Satisfied by Morrissey's Statements to a Newspaper that the Charges Should Never Have Been Filed and Would be Laughed Out of Court, the Court's Below Demonstrated that the Standard Censors Even Innocuous and General Puffery, and is Well Below the Threshold Protection Required by this Court's Ruling in *Gentile*.....16

1. Morrissey's Newspaper Statements Were Deemed to be Sufficient Alone to Satisfy the Reasonable Likelihood Standard.....16

2. No Plausible Reading of Gentile or Existing First Amendment Doctrine Permits an Attorney to be Disciplined for Such General Puffery.....17

F. The Articulation of Specific Categories of Proscribed Attorney Speech in Local Rule 57 Does Not Rescue an Otherwise Unconstitutional Standard, When Those Categories Themselves are So Broad as to Encompass Virtually Any and All Meaningful Public Communication Concerning a Pending Criminal Matter.....18

G. An Unconstitutional Standard Does not Become Constitutional Merely Because its Application is Administratively Subdivided into Topic Areas.....20

II. THE RULING BELOW HAS CREATED A CONFLICT WITHIN THE FEDERAL CIRCUITS, AND A CONFLICT BETWEEN FEDERAL STANDARDS AND THE STANDARDS APPLIED BY MOST STATES. ..... 23

A. There is Conflict Within the Federal Circuits ..... 23

B. The Standard of Local Rule 57, If Approved, Would Permit Federal Courts to Apply a Threshold Lower than the Overwhelming Number of State Bars, Creating an Inappropriate Tension within the Federal System, Compounding the Constitutional Infirmities Posed by the Rule ..... 24

C. This Court's Unique Leadership Role in Relation to the Both the Legal Profession and the Management of the Federal Judicial System Is a Factor that Should Weigh Significantly in Favor of Granting this Petition ..... 26

D. This Court Should Reinforce and Clarify Gentile, Providing Lower Courts with Guidance and Attorneys with the Minimum Protections Required by the First Amendment ..... 28

CONCLUSION ..... 30

APPENDIX ..... App. i

## TABLE OF AUTHORITIES

### CASES

*44 Liquormart v. Rhode Island*,
517 U.S. 484 (1996) ..... 13

*Abrams v. United States*,
250 U.S. 616 (1919) ..... 17

*Bates v. State Bar of Arizona*,
433 U.S. 350 (1977) ..... 27

*Bernard v. Gulf Oil Company*,
619 F.2d 459 (5th Cir. 1980) ..... 23

*Bose Corp. v. Consumer's Union of United States, Inc.*,
466 U.S. 485 (1984) ..... 22

*Brandenburg v. Ohio*,
395 U.S. 444 (1969) ..... 22

*Bridges v. California*,
314 U.S. 252 (1941) ..... 16, 28

*Butterworth v. Smith*,
494 U.S. 624 (1990) ..... 28

*Central Hudson Gas & Electric v.*
*Public Service Comm. of New York*,
447 U.S. 557 (1980) ..... 13

*Chicago Council of Lawyers v. Bauer*,
522 F.2d 242 (7th Cir.1975) ..... 23

*Dolan v. City of Tigard*,
512 U.S. 374 (1994) ..... 13

*Florida Bar v. Went For It, Inc.*,
515 U.S. 618 (1995).....22, 27, 28

*Gentile v. State Bar of Nevada*,
501 U.S. 1030 (1991).....passim

*Globe Newspaper Co. v. Superior Court*,
457 U.S. 596 (1982).....28

*Gooding v. Wilson*,
405 U.S. 518 (1972).....5

*Greenbelt Cooperative Publishing Assoc. v. Bresler*,
398 U.S. 6 (1970).....17

*Herndon v. Lowry*,
301 U.S. 242 (1937).....21

*Hirschkop v. Snead*,
594 F.2d 356 (4th Cir. 1979).....4, 6, 10, 11

*In re Hinds*,
90 N.J. 604, 449 A.2d 483 (1982).....16

*In re Morrissey*,
168 F.3d 134 (4th Cir. 1999).....1, 10, 18

*In re Morrissey*,
996 F. Supp. 530 (E.D. Va. 1998).....1, 10, 17, 18

*In re Oliver*,
333 U.S. 257 (1948).....29

*In re Primus*,
436 U.S. 412 (1978).....22, 27

*In re RMJ*,
455 U.S. 191 (1982) ..... 27

*In re Russell*,
726 F.2d 1007 (4th Cir. 1984) ..... 4

*In re Sawyer*,
360 U.S. 622 (1959) ..... 9, 27

*Konigsberg v. State Bar of California*,
367 U.S. 1 (1961) ..... 27

*Landmark Communications, Inc. v. Virginia*,
435 U.S. 829 (1978) ..... 16, 21, 28

*Lewis v. United States*,
415 U.S. 130 (1974) ..... 5

*Marbury v. Madison*,
5 U.S. (1 Cranch) 137 (1803) ..... 27

*Mississippi University for Women v. Hogan*,
458 U.S. 718 (1982) ..... 13

*NAACP v. Button*,
371 U.S. 415 (1963) ..... 27

*Nebraska Press Association. v. Stuart*,
427 U.S. 539 (1976) ..... 28

*New York Times Co. v. Sullivan*,
376 U.S. 254 (1984) ..... 22

*Ohralik v. Ohio State Bar Association*,
436 U.S. 447 (1978) ..... 27

*Peel v. Attorney Registration and Disciplinary Comm. of Ill.*,
496 U.S. 91 (1990).....27

*Pennekamp v. Florida*,
328 U.S. 331 (1946).....28

*Press-Enterprise Co. v. Superior Court*,
464 U.S. 501 (1984).....28

*Press-Enterprise Co. v. Superior Court*,
478 U.S. 1 (1986).....28

*R.A.V. v. City of St. Paul*,
505 U.S. 377 (1992).....22

*Richmond Newspapers, Inc. v. Virginia*,
448 U.S. 555 (1980).....28

*Schware v. Board of Examiners of New Mexico*,
353 U.S. 232 (1957).....28

*Seattle Times Co. v. Rhinehart*,
467 U.S. 20 (1984).....8

*Seattle Times Co. v. Rhinehart*,
467 U.S. 20 (1984).....28

*Shapiro v. Kentucky Bar Association*,
486 U.S. 466 (1988).....27

*Sheppard v. Maxwell*,
384 U.S. 333 (1966).....8, 20, 21

*Turner v. Louisiana*,
379 U.S. 466 (1965).....8

*United States v. Cutler*,
58 F.2d 825 (2nd Cir. 1995) ..... 23

*United States v. Lopez*,
514 U.S. 549 (1995) ..... 13

*United States v. Virginia*,
515 U.S. 518 (1996) ..... 13

*United States v. Wunsch*,
84 F.3d 1110 (9th Cir. 1996) ..... 23

*Whitney v. California*,
274 U.S. 357 (1927) ..... 21

*Wood v. Georgia*,
370 U.S. 375 (1962) ..... 16, 28

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported as: *In re Morrissey*, 168 F.3d 134 (4th Cir. 1999), and is included in the Appendix ("App."). The Opinion of the United States District Court for the Eastern District of Virginia is reported as: *In re Morrissey*, 996 F. Supp. 530 (E.D. Va. 1998), and is included in the Appendix.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 11, 1999, and a Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 10, 1999. This Petition for a Writ of Certiorari is filed within ninety days of that date, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The First Amendment to the Constitution of the United States states that "Congress shall make no law . . . abridging the freedom of speech . . ."

Local Criminal Rule 57(C) of the United States District Court for the Eastern District of Virginia states, in pertinent part, as reproduced in the Appendix. App. 40-43.

## STATEMENT OF THE CASE

### A. Introduction

The Petitioner, Joseph D. Morrissey, is a member of the Virginia State Bar and the bar of the United States District Court for the Eastern District of Virginia. Morrissey

was convicted on two counts of criminal contempt for making extrajudicial statements to the media on behalf of his client, a defendant in a federal criminal prosecution. One count was for statements made to a local newspaper, the *Richmond-Times Dispatch*, that the charges against his client "never should have been filed," and that had the matter been brought to his attention when he was a prosecutor, "we would have laughed it out of court." App. 5, 25. The other count was for holding a press conference and showing a videotape of a prosecution witness, in which the witness recanted his testimony. Applying Local Criminal Rule 57(C) of the United States District Court for the Eastern District of Virginia ("Local Rule 57"), which requires only a "reasonable likelihood" of interference with a fair trial, the District Court found Morrissey guilty on both counts, a judgment affirmed by the United States Court of Appeals for the Fourth Circuit. Morrissey claims in this Petition that Local Rule 57 violates the First Amendment by falling below the minimum constitutional threshold of "substantial likelihood of material prejudice" approved by this Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

**B. Statement of Facts**

Joseph Morrissey is an experienced criminal and civil trial lawyer. In the course of his sixteen-year career, he has tried over 300 jury trials. He has served as the elected chief prosecutor for the Commonwealth of Virginia in Richmond as well as a high-profile criminal defense attorney. App. 2. The contempt charges at issue here arose from Morrissey's representation of a criminal defendant, Joel W. Harris. Harris was a longtime Richmond political figure and Mayoral aide who was charged with drug distribution by the state of Virginia. App. 2. The state indictment against Harris drew a frenzy of charges and counter-charges in the media. App. 18-19. Prosecutors claimed that Harris traded drugs for sex. Harris in turn claimed that he was the victim

of political persecution and that the government was pressuring him to provide information on African-American elected officials. (Sent. Tr. 2/24/98 at 7).

Federal authorities eventually took over the investigation against Harris. The state charges were dropped, and Harris was indicted by a federal grand jury. The first federal indictments against Harris contained such details as an allegation that he had distributed drugs "in connection with group heterosexual and homosexual relations," references which were not necessary elements of the crimes charged, and the first "speaking indictment" was faxed to the *Richmond Times-Dispatch* by the United States Attorney's Office.

In the course of Morrissey's investigations on behalf of his client, a private investigator retained by Morrissey interviewed John Buerkley, a witness who had testified against Harris before the Virginia state grand jury. In that interview, which was videotaped with Buerkley's consent, Buerkley recanted his testimony against Harris. At the insistence of Harris, Morrissey held a press conference and played the videotape of the interview for the media. App. 21-22. Two months later, in a newspaper interview, Morrissey stated that the charges against Harris "never should have been filed" and that if the charges had come up when Morrissey headed the state prosecutor's office, "we would have laughed it out of court." App. 5, 25.

For these two incidents, Morrissey was charged with two counts of criminal contempt for violating Local Rule 57. The trial court imposed a sentence to include thirty days in jail for the first violation of Local Rule 57 and an additional sixty days in jail for describing the government's case as laughable.

### C. Local Rule 57

Local Rule 57(A) provides in pertinent part that a lawyer may not speak about "potential or imminent criminal

litigation" if "there is a reasonable likelihood that such dissemination would interfere with a fair trial or otherwise prejudice the due administration of justice." Local Rule 57(C) contains a specific list of six types of prohibited statements regarding pending criminal matters, including "the identity, testimony, or credibility of prospective witnesses," Rule 57(C)(4), and "[a]ny opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case," Rule 57(C)(6). Finally, Local Rule 57(D), dealing with statements made during a criminal jury trial, reiterates the "reasonable likelihood" standard.[1]

### D. Judgments Below

The District Court held that Morrissey's press conference and statements to the newspaper violated the prohibitions on comment regarding prospective witnesses and expressions of opinion as to the merits or the evidence, contained in Local Rule 57(C)(4) and (C)(6). App. 15-16. Morrissey challenged the constitutionality of Local Rule 57, arguing that the rule's "reasonable likelihood" standard was considerably broader and less protective than the "substantial likelihood of material prejudice" test approved by this Court in *Gentile v. State Bar of Nevada*. App. 26. The District Court rejected this attack on the rule, treating this Court's

---

[1] Although the text of Local Rule 57(C), containing the list of six prohibited classes of speech, does not itself actually contain the "reasonable likelihood" standard, the rule has been authoritatively construed as requiring that the "reasonable likelihood" test be satisfied as to all parts of the rule, including the six prohibitions of Rule 57(C). *See Hirschkop v. Snead*, 594 F.2d 356, 368 (4th Cir. 1979) (interpreting state Disciplinary Rule 7-107(B), which at that time was identical to Local Rule 57(C), and stating that it "does not strain the language of the rule" to treat the reasonable likelihood qualification as "implicit" in each of the six categories.) *See also In re Russell*, 726 F.2d 1007, 1010-11 (4th Cir. 1984) (following *Hirschkop* and affirming constitutionality of "reasonable likelihood" standard).

endorsement of the "substantial likelihood of material prejudice" standard as dicta that did not foreclose application of the lower "reasonable likelihood" test. App. 34. The District Court reasoned that the principal import of *Gentile* was the rejection of the application of the highly rigorous "clear and present danger" standard to speech by lawyers on pending criminal matters. The District Court held that *Gentile* did not ordain the "substantial likelihood of material prejudice" test as the minimum constitutional standard, despite the numerous pronouncements in *Gentile* appearing to endorse the intermediate-level "substantial likelihood of material prejudice" test. App. 34. The District Court also reasoned that the device in Local Rule 57(C) of breaking down prohibited categories of expression into six enumerated topics served to narrow the rule, further bolstering its constitutionality. App. 34-37.[2] The Court of

---

[2] In the Court of Appeals below, the government advanced the erroneous claim that the District Court had found, as an alternative basis for its ruling, that Morrissey's actions would satisfy the higher "substantial likelihood of material prejudice" standard. This claim was factually inaccurate and legally flawed. Nothing in the District Court's opinion, or in the opinion of the Court of Appeals, applies or addresses the higher "substantial likelihood of material prejudice" standard. Indeed, the District Court explicitly stated in open court its view that if Local Rule 57 is constitutional, Morrissey is guilty, but if the rule is struck down, the case against Morrissey is over. (Sent. Tr. 2/24/98 at 49). On this point the District Court was exactly right, for this is a criminal prosecution, and if the criminal provision upon which the prosecution is based is deemed void, there is nothing left to support a criminal conviction. It bears emphasizing that this is a facial challenge to Local Rule 57. In such a facial attack there is "no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Gooding v. Wilson*, 405 U.S. 518, 420 (1972). As the District Court itself recognized, if the rule falls, so do Morrissey's convictions. (Sent. Tr. 2/24/98 at 49). It is immaterial that the government may deem Morrissey's conduct egregious; it "is immaterial that the words appellant used might be punishable under a properly limited statute or ordinance." *Lewis v. United States*, 415 U.S. 130, 133 (1974).

Appeals affirmed in an opinion that entirely tracked the reasoning of the District Court. The Court of Appeals relied heavily on its own pre-*Gentile* decision in *Hirschkop v. Snead*, 594 F.2d at 368, in which it had adopted the lower "reasonable likelihood" standard, holding that it did not regard *Gentile* as silently overruling its ruling in *Hirschkop*. App. 8-11.

## REASONS FOR GRANTING THE WRIT

### I. THE "REASONABLE LIKELIHOOD OF INTERFERENCE" STANDARD ESTABLISHED IN THE RULING BELOW CONFLICTS WITH THE "SUBSTANTIAL LIKELIHOOD OF MATERIAL PREJUDICE" STANDARD APPROVED IN *GENTILE V. STATE BAR OF NEVADA*, AND IF PERMITTED TO STAND, WILL ALLOW FEDERAL COURTS TO DISCIPLINE ATTORNEYS UNDER THE APPLICATION OF A STANDARD THAT VIOLATES THE FIRST AMENDMENT.

#### A. The Reasonable Likelihood Standard is Significantly Less Protective Than the Substantial Likelihood of Material Prejudice" Test Approved in *Gentile*.

In *Gentile v. State Bar of Nevada*, this Court considered the constitutionality of a disciplinary rule barring lawyers from making extrajudicial statements that would have a "substantial likelihood of materially prejudicing an adjudicative proceeding." *Gentile*, 501 U.S. at 1060. Justice Kennedy's plurality opinion, joined by Justices Stevens, Blackmun, and Marshall, would have required a standard *higher* than "substantial likelihood of material prejudice." While Justice Kennedy's opinion made it clear that a disciplinary rule need not recite the exact incantation "clear and present danger," the plurality would have required that a

rule must, either on its face or as authoritatively construed, embody a requirement of "serious and imminent threat" to meet minimum constitutional standards. *Id.* at 1037 (Plurality Opinion of Kennedy, J.).

It was this issue–the question of whether something akin to the highly protective "clear and present danger" test should apply to attorney comments on pending proceedings–that divided the Court. The plurality opinion of Chief Justice Rehnquist, which on this point commanded the approval of five Justices of the Court, (Justices Scalia, O'Connor, Souter, and White joined the Chief Justice on this issue), held that a standard less than "clear and present danger," or any equivalent test requiring an *imminent* threat, was appropriate when dealing with the speech of attorneys commenting on pending criminal proceedings. The key passage in the Chief Justice's opinion deserves repetition in its entirety:

> When a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question. . . .The "substantial likelihood" test embodied in Rule 177 is constitutional under this analysis, for it is designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that

> fundamental right. . . . Even if a fair trial can ultimately be ensured through voir dire, change of venue, or some other device, these measures entail serious costs to the system. Extensive voir dire may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by petitioner. The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants.
>
> The restraint on speech is narrowly tailored to achieve those objectives. The regulation of attorneys' speech is limited--it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after the trial. While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding.

*Id.* at 1075-76, *citing Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984); *Sheppard v. Maxwell*, 384 U.S. 333, 350-351 (1966); *Turner v. Louisiana*, 379 U.S. 466, 473 (1965).

Justice O'Connor cast the pivotal swing vote in *Gentile*, joining parts of the opinion of the Chief Justice and

parts of the opinion of Justice Kennedy.[3] On the central question of what First Amendment standard should be applied, Justice O'Connor, in a brief concurring opinion, wrote:

> I agree with much of THE CHIEF JUSTICE's opinion. In particular, I agree that a State may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press. Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech. . . .This does not mean, of course, that lawyers forfeit their First Amendment rights, only that a less demanding standard applies. I agree with THE CHIEF JUSTICE that the "substantial likelihood of material prejudice" standard articulated in Rule 177 passes constitutional muster.

*Id.* at 1081-82 (O'Connor, J., concurring), *citing In re Sawyer*, 360 U.S. 622, 646-647 (1959) (Stewart, J., concurring in result).

Distilled, the net result in *Gentile* was that all nine members of the Court endorsed "substantial likelihood of material prejudice" *or better* as the minimum standard permissible under the First Amendment. Notwithstanding the ostensibly clear import of the opinion of the Chief Justice and the concurring opinion of Justice O'Connor, the Court of

---

[3] This Court's disposition in *Gentile* was unusual, in that two differently constituted four-Justice plurality opinions, each joined in part by Justice O'Connor (who provided the fifth vote that turned sections of each plurality into the Opinion of the Court) and each delivered part of the Opinion of the Court.

Appeals below interpreted *Gentile* as permitting criminal liability against Mr. Morrissey to be imposed on a mere showing of "reasonable likelihood" of prejudice, treating the opinions of the Chief Justice and Justice O'Connor as if their careful defense of the "substantial likelihood of material prejudice" test were mere casual word choice or cavalier dicta.

### B. The Courts Below Acknowledged that the Reasonable Likelihood Standard was Lower than Substantial Likelihood of Material Prejudice Standard.

The Court of Appeals lowered the bar, and in so doing, misinterpreted *Gentile* and the misconceived the First Amendment. Both the Court of Appeals and the District Court below consciously understood and explicitly stated that the reasonable likelihood test was less demanding than the substantial likelihood of material prejudice standard. The Courts below staked their rulings on the argument that the lower standard was all that was constitutionally required. *See In re Morrissey*, App. 10 ("In dicta, the Court acknowledged the existence of different standards, including the 'reasonable likelihood' standard in place in eleven states. It did not, however, as Morrissey insists, make any attempt to evaluate the constitutionality of any test other than the 'substantially likely' standard as presented in that case. Nor is Morrissey's interpretation of *Gentile* supported by the Court's comment in dicta that the 'reasonable likelihood' standard is 'less protective of lawyer speech.'"); *In re Morrissey*, App. 34 ("Nor is Morrissey's interpretation of *Gentile* proved by the comment in *Gentile* that the reasonable likelihood standard is 'less protective of attorney speech' than is the Nevada rule."). The District Court, and in turn the Court of Appeals, relying on the Fourth Circuit's pre-*Gentile* holding in *Hirschkop v. Snead*, held that "[n]o

heavier or stiffer standard than the reasonable likelihood test is needed to protect" lawyers. *Hirschkop*, 594 F.2d at 369.

### C. This Court in *Gentile* Observed that the Reasonable Likelihood Standard was Less Protective than the Substantial Likelihood of Material Prejudice Standard.

This Court in *Gentile* was clearly cognizant of the three-level hierarchy created by the main competing formulations for dealing with extrajudicial comments by attorneys on pending cases that were at large when *Gentile* was decided: (1) clear and present danger (or its equivalent); (2) substantial likelihood of material prejudice; and (3) reasonable likelihood of prejudice. As the pertinent passage from the opinion of the Chief Justice makes abundantly clear, this Court saw "reasonable likelihood" as a distinctly lower standard than "substantial likelihood of material prejudice:"

> Ten years later, the ABA amended its guidelines, and the "reasonable likelihood" test was changed to a "clear and present danger" test. ABA Standards for Criminal Justice 8-1.1 (as amended 1978) (2d ed. 1980, Supp.1986).
>
> When the Model Rules of Professional Conduct were drafted in the early 1980's, the drafters did not go as far as the revised fair trial-free press standards in giving precedence to the lawyer's right to make extrajudicial statements when fair trial rights are implicated, and instead adopted the "substantial likelihood of material prejudice" test. Currently, 31 States in addition to Nevada have adopted--either verbatim or with

> insignificant variations--Rule 3.6 of the ABA's Model Rules. Eleven States have adopted Disciplinary Rule 7-107 of the ABA's Code of Professional Responsibility, *which is less protective of lawyer speech than Model Rule 3.6, in that it applies a "reasonable likelihood of prejudice" standard.* Only one State, Virginia, has explicitly adopted a clear and present danger standard, while four States and the District of Columbia have adopted standards that arguably approximate "clear and present danger."

*Gentile*, 501 U.S. at 1068 (Opinion of the Chief Justice) (emphasis supplied).

**D. The "Substantial Likelihood" Standard Approved in *Gentile* Was Intended by this Court to Set the Constitutional Floor, Invoking an Intermediate Scrutiny Standard Deliberately Calculated to Provide Greater Protection than Mere "Reasonableness" or "Rational Basis" Formulations.**

We deal here with more than mere verbiage. However artificial and contrived legal formulations may be on some levels, they are the tools of the discipline. In constitutional law, variants of "intermediate scrutiny" are often employed to impose demanding standards of review considerably more rigorous than the highly deferential reasonableness or rational basis tests applied to run-of-the-mill economic and social legislation, yet not as demanding as such extremely high standards as "strict scrutiny" or "clear and present danger." The requirements that the government demonstrate "important" or "substantial" justifications for its actions and a "narrow tailoring" of the means to the end are the touchstones of intermediate review. Intermediate scrutiny tests, varying slightly in their exact formulation as

doctrinal contexts change, have thus been employed to impose significant protection against the abridgement of constitutional norms across the expanse of constitutional adjudication. *See, e.g., Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980) (adopting an intermediate level-commercial speech standard requiring, among other things, that the regulation be supported by a "substantial" governmental interest and be "not more extensive than necessary" to serve that interest); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982) (applying intermediate scrutiny in gender discrimination cases, requiring that state program be justified by a substantial governmental interest); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (striking down federal legislation as exceeding Congress' power to regulate commerce, holding that to be upheld the law must regulate activity that has a "substantial effect" on interstate commerce).

When this Court requires a *substantial* nexus, it is uncompromising, and this Court has not tolerated slippage into the more deferential standards of rational basis review. *See, e.g., 44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (applying intermediate commercial speech standard to strike down paternalistic regulation on liquor pricing, emphasizing need for rigorous review); *United States v. Virginia*, 515 U.S. 518, 532 (1996) (applying intermediate scrutiny in gender discrimination case, requiring that government justification be "exceedingly persuasive."). Indeed, when this Court has settled on a standard of review more rigorous than rational basis scrutiny, it has deliberately eschewed use of the terminology cast in the phrasings of "reasonable" relationships, precisely because of the danger that this standard will devolve into the pallid deference characteristic of rational basis review. *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) ("We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those

previously discussed. But we do not adopt it as such, partly because the term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment.").

A careful reading of *Gentile* shows that the opinion of the Chief Justice clearly understood the "substantial likelihood of material prejudice" formula as a variant of intermediate scrutiny. Thus, in describing why the standard was appropriate, the Chief Justice observed that the "State has a substantial interest in preventing officers of the Court, such as lawyers, from imposing such costs on the judicial system and litigants," elaborating that "[t]he restraint on speech is narrowly tailored to achieve those objectives." *Gentile*, 501 U.S. at 1075. Contrary to the treatment given this analysis by the Court of Appeals, the approval of the "substantial likelihood of material prejudice" standard in *Gentile* was not gratuitous dicta, but a carefully considered statement of constitutional *minima*. It must be remembered that "clear and present danger" was a near-miss in *Gentile*. The standard did not prevail, but that hardly meant that the bottom dropped out. If a standard as permissive as "reasonable likelihood" would have sufficed, there would have been no need for the Chief Justice's detailed analysis of the state's substantial interests and the rule's narrow tailoring.

Indeed, what really divided the two groupings of Justices in *Gentile* was not a debate over either the gravity of the harm to pending proceedings that would justify the discipline of a lawyer, or the causal nexus between the lawyer's speech and harm to the proceedings, but instead a debate over the imminence of that harm. The main difference between the standard that Justices Kennedy, Stevens, Marshall, and Blackmun endorsed, and the standard approved by the Chief Justice, and Justices Scalia, O'Connor, Souter, and White, was that Justice Kennedy's opinion would have required some element of "imminence"

to the harm of the sort traditionally associated with applications of the "clear and present danger" line of precedent. *Compare Gentile*, 501 U.S. at 1037 (Opinion of Kennedy, J.) *with Gentile,* 501 U.S. at 1074 (Opinion of Rehnquist, C.J.). There was no suggestion in the Chief Justice's opinion for the Court, however, that the Court would tolerate a watered-down standard satisfied by a mere "reasonable likelihood" that a lawyer's statement "would interfere with a fair trial." *See* Local Rule 57(A). The phrasings approved were *material prejudice* and *substantial harm*. *Id.* at 1076 (Opinion of Rehnquist, C.J.). These safeguards are clearly greater than mere "reasonable likelihood."

The various verbal formulas that constitute the principal tiers of review in modern constitutional law are not casual linguistic word choices or hollow semantics. Sophisticated lawyers understand, of course, that it is not the formal verbal test that matters, but rather the underlying *reality* that the verbal test labors to embody, a reality solidified over time through the repeated application of the standard to actual facts. Any test applied to constrict the speech of an attorney concerning pending proceedings will be calibrated in terms of such factors as the degree of harm and the proximity of the speech to that harm. On that scale, it is clear that the "substantial likelihood of material prejudice" standard is an intermediate test much closer to such heightened and rigorous First Amendment standards as "clear and present danger" rather than such deferential standards as "reasonableness" or "rationality." Indeed, as the opinion of Justice Kennedy recognized in *Gentile*, tracing the standard from its genesis within the ABA, it is plain that the drafters of ABA Model Rule 3.6 conceived of the substantial likelihood of material prejudice formulation as resembling the traditional clear and present danger test.[4] *See Gentile*, 501 U.S. at 1076 (Plurality Opinion of Kennedy, J.).

---

[4] *See ABA Annotated Model Rules of Professional Conduct* 243 (1984) ("formulation in Model Rule 3.6 incorporates a standard approximating

### E. In Holding that the Reasonable Likelihood Standard Was Satisfied by Morrissey's Statements to a Newspaper that the Charges Should Never Have Been Filed and Would be Laughed Out of Court, the Courts Below Demonstrated that the Standard Censors Even Innocuous and General Puffery, and is Well Below the Threshold Protection Required by this Court's Ruling in *Gentile*.

#### 1. Morrissey's Newspaper Statements Were Deemed to be Sufficient Alone to Satisfy the Reasonable Likelihood Standard.

Lest there be any doubt that the stakes here are significant and the standard embodied in Local Rule 57 dramatically lower than the threshold demanded by the First Amendment, this Court must bear in mind that the second count of criminal contempt upon which Morrissey was convicted was predicated *solely* on the statements he made to a local newspaper reporter that the charges against his client "never should have been filed" and that, back in his days as a prosecutor, "we would have laughed it out of court."

---

clear and present danger by focusing on the likelihood of injury and its substantiality," *citing Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978); *Wood v. Georgia*, 370 U.S. 375 (1962), *Bridges v. California*, 314 U.S. 252, 273 (1941), for guidance in determining whether statement "poses a sufficiently serious and imminent threat to the fair administration of justice"). *See also* G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 397 (1985) ("To use traditional terminology, the danger of prejudice to a proceeding must be both clear (material) and present (substantially likely"); *In re Hinds*, 90 N.J. 604, 622, 449 A.2d 483, 493 (1982) (substantial likelihood of material prejudice standard is a linguistic equivalent of clear and present danger).

**2. No Plausible Reading of Gentile or Existing First Amendment Doctrine Permits an Attorney to be Disciplined for Such General Puffery.**

As applied by the Court of Appeals, "should never have been filed" and "laughed it out of court" are within the ambit of the deferential "reasonable likelihood" standard. These innocuous exercises in general puffery, these highly amorphous claims that the charges were wrong and laughable, can bear absolutely no credible claim to causing any palpable prejudice to the ultimate integrity of the criminal trial. This was at most "rhetorical hyperbole." *See Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 14 (1970). Yet, Morrissey received a sixty-day sentence for his rhetorical hyperbole. Measured against the vitriolic salvos common in today's high-visibility criminal trials, these comments barely move the Richter scale.[5] That the District Court and the Court of Appeals treated this as *easily* satisfying Local Rule 57 demonstrates how low a standard Local Rule 57 truly is. *See In re Morrissey*, 966 F. Supp. at 538, App. 34 (describing these comments as "the expression of a lawyer about the merits of the case" and stating that "[i]t is beyond serious question that comments of that sort 'are likely to influence the actual outcome of the trial' and 'are likely to prejudice the venire'").

There is simply not enough that can be squeezed from Morrissey's remarks "to turn the color of legal litmus paper." *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting). If the First Amendment will tolerate jailing a lawyer for a lengthy sixty days for comments such as these, the First Amendment is no shelter

---

[5] *See* Tom Squitieri, *Lawyer Sure of Winning Case for McDougal*, USA Today, March 15, 1999, at 10A. (Quoting Hickman Ewing, chief deputy to Independent Counsel Kenneth Starr, as saying in "every high-profile trial, it's almost malpractice for defense lawyers if they don't try to put the prosecutor on trial.").

to lawyers at all. If Morrissey's statements are not safe, none are. If Morrissey's statements can be censored, all can be.

**F. The Articulation of Specific Categories of Proscribed Attorney Speech in Local Rule 57 Does Not Rescue an Otherwise Unconstitutional Standard, When Those Categories Themselves are So Broad as to Encompass Virtually Any and All Meaningful Public Communication Concerning a Pending Criminal Matter.**

The Court of Appeals reasoned that the list of six specific categories of prohibited speech in Local Rule 57 rescued the rule from what might otherwise have been an unconstitutionally lax standard. In effect, the Court of Appeals seemed to treat the lower "reasonable likelihood" formula as somehow redeemed by the rule's breakdown of impermissible speech into six delineated categories. *In re Morrissey*, App. 12. *See also In re Morrissey*, 996 F. Supp. at 530, App. 36.

But as water cannot rise higher than its source, the protection for freedom of speech offered by Local Rule 57 cannot be deemed higher than the "reasonable likelihood" standard that functions as the omnibus default rule within each specific category. Both the District Court and the Court of Appeals appeared to concede that the "reasonable likelihood" standard would not provide sufficient First Amendment protection, standing alone. *In re Morrissey*, App. 12; *In re Morrissey*, 996 F. Supp. at 529-30, App. 36-37. But the mere fact that the rule has created a six-part taxonomy of statements, subdividing the talk of lawyers into neat divisions, does not raise the First Amendment protection applicable *within* each division.

There is no meaningful difference between the structure of Local Rule 57 and the structure of Nevada Rule 177 at issue in *Gentile*. For Nevada Rule 177 *also* contained a similar subdivided list of proscribed statements, virtually

identical to those of Local Rule 57. It is true that Nevada treated its list as presumptive examples to guide attorneys as to the types of statements that would constitute a substantial likelihood of causing material prejudice, whereas Local Rule 57 requires an attorney's statement to first fall within one of the six categories, and then constitute a "reasonable likelihood" of causing interference with a fair trial. Chief Justice Rehnquist's opinion in *Gentile*, however, clearly considered the list of examples as structurally connected to the overriding "substantial likelihood" prohibition of Nevada Rule 177, noting that the prohibition and the "safe harbor" caveat of Nevada Rule 177 "must be read in the light of the prohibitions and examples contained in the first two sections." *Gentile*, 501 U.S. at 1078 (Opinion of the Chief Justice). More significantly, the Chief Justice was careful to emphasize that the Nevada disciplinary board and the Nevada Supreme Court had applied the "substantial likelihood of material prejudice" standard *independently* to the actual statements made by Dominic Gentile, and had not mechanically applied the presumptions within each category. *Id.* at 1080.[6]

The purported "narrowing" of the standard through operation of the six categories in Local Rule 57 is greatly exaggerated. Indeed, it is not clear that the six topics, considered together, constitute any genuine narrowing at all. With minor exceptions, they encompass all discussion of prior criminal records, or the character or reputation of the accused, of the existence of any confession, admission, or statement by the accused, or the lack thereof, of the

---

[6] It is also worth noting here that Justice Kennedy's opinion commanded a five-Justice majority in striking down as unconstitutionally vague the "safe harbor" provision of Rule 177, which was intended to be the "foil" for the types of speech otherwise prohibited by the rule by allowing a lawyer to state "without elaboration" the "general nature" of the defense. *Gentile*, 501 U.S. at 1048 (Opinion of the Court of Kennedy, J.).

performance of the accused on any examination or tests, of the identity, testimony, or credibility of prospective witnesses, of the possibility of any guilty plea or charge on a lesser offense, or any opinion as to the accused's guilt or innocence or the merits of the case or the evidence in the case. After this list is exhausted there is not much left to say. There certainly is nothing meaningful left to say. The rule effectively takes every form of speech plausibly germane to a criminal proceeding and subjects it to the "reasonable likelihood" standard. Any pretense here to "narrowing" is thus highly illusory.

### G. An Unconstitutional Standard Does not Become Constitutional Merely Because its Application is Administratively Subdivided into Topic Areas.

It is true that the six categories contained within Local Rule 57 can trace their lineage to illustrations of potentially proscribable attorney speech articulated by this Court in *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966). But this only underscores the error of the Court of Appeals' analysis below, for *Sheppard*, a case finding that pre-trial publicity had violated the rights of the accused, merely suggested a possible range of palliatives, including restrictions on the statements of attorneys. *Sheppard* was not a First Amendment case and did not purport to establish the substantive standards of proximity and degree that would be superimposed upon the suggested list of restrictions. Indeed, if *Sheppard* meant that statements falling within the list were *automatically* outside the First Amendment's shelter there would have been no need even to apply the analysis this Court employed in *Gentile*. Yet all of the members of the Court in *Gentile* (including the Chief Justice, who relied significantly on *Sheppard*) treated either the "substantial likelihood" (in the Opinion of the Chief Justice) or something akin to "clear and present danger" (in the Opinion of Justice Kennedy) as applying *independently* to an

attorney's statements even when the statements fall within the topical range of statements described in *Sheppard.* It therefore follows that the appropriate First Amendment standard–substantial likelihood of material prejudice or better--must now be independently superimposed upon the "*Sheppard* topics" as they are now entrenched in Local Rule 57.

If this is not done--if the mere fact that a lawyer's statement falls within one of the six categories on the forbidden list is enough to lower the protection of the Constitution to mere reasonable likelihood--then the government can effectively defeat First Amendment protections that would otherwise apply through the mere process of taxonomy and definition. This turns the First Amendment upside down.

The axiom of today's First Amendment jurisprudence is exactly the opposite: the government cannot "define in advance" the words or language of a speaker that defeat First Amendment protection. *See, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978) ("A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified."); *Herndon v. Lowry*, 301 U.S. 242, 258 (1937) (state may not restrict words that have a mere bad tendency to be dangerous, and attempts to penalize "even utterances of a defined character" must satisfy standard applied independently by courts); *Whitney v. California*, 274 U.S. 357, 378-379 (1927) (Brandeis, J., concurring) ("[A legislative declaration] does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under

the Federal Constitution. . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature."). *See also Bose Corp. v. Consumer's Union of United States, Inc.*, 466 U.S. 485, 499 (1984) ("appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.") *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 284, 286 (1984); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (hate speech statute confining proscriptions to use of certain symbols unconstitutional even if the conduct proscribed would otherwise be unprotected under the standards of *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

In short, the Court of Appeals' logic is that First Amendment protection can be diminished when the proscriptions on speech are applied within pre-defined channels, thus empowering disciplinary rules drafting committees and implementing courts to pretermit application of the constitutional standards that would otherwise apply. But *Gentile* was not a pronouncement inviting such deference. It was rather a well-honed exercise in the balancing of competing interests. Indeed, this Court has subsequently referred to *Gentile* as establishing *strong* protection for freedom of speech, noting that "[t]here are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995) (*citing Gentile*; *In re Primus*, 436 U.S. 412 (1978)).

## II. THE RULING BELOW HAS CREATED A CONFLICT WITHIN THE FEDERAL CIRCUITS, AND A CONFLICT BETWEEN FEDERAL STANDARDS AND THE STANDARDS APPLIED BY MOST STATES.

### A. There is Conflict Within the Federal Circuits.

As the Court of Appeals itself acknowledged, its ruling that "reasonable likelihood" was sufficient to satisfy First Amendment requirements was in conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir.1975), *cert. denied*, 427 U.S. 912 (1976) ("We are of the view that the rubric used in the rules under consideration, that lawyers' comments about pending or imminent litigation must be proscribed 'if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice' is overbroad and therefore does not meet constitutional standards."). Similarly, the Ninth Circuit has interpreted *Gentile* as imposing a "substantial likelihood of material prejudice" standard. *United States v. Wunsch*, 84 F.3d 1110, 1117 (9th Cir. 1996) (reading *Gentile* as holding that "in order to satisfy the First Amendment, there must be facts showing a substantial likelihood of material prejudice to an adjudicative proceeding before a lawyer may be disciplined for extrajudicial comments.").[7] In *United States v. Cutler*, 58 F.2d 825 (2nd Cir. 1995), an attorney challenged the application of Local Rule 7 of the United

[7] *See also Bernard v. Gulf Oil Company*, 619 F.2d 459, 474 (5th Cir. 1980) (en banc) (citing with approval *Chicago Council of Lawyers v. Bauer* in striking down gag order on attorneys, quoting *Bauer* and stating: "A lawyer's First Amendment right to comment about pending or imminent criminal litigation can be proscribed only if his comments pose a 'serious and imminent threat' of interference with the fair administration of justice.'").

States District Court for the Eastern District of New York, a rule identical to Local Rule 57 here, claiming that the "reasonable likelihood" standard violated the First Amendment. Applying the "collateral bar" rule, the Court of Appeals refused to entertain the challenge, thus leaving the "reasonable likelihood" standard in place. *Id.* at 832.

**B. The Standard of Local Rule 57, If Approved, Would Permit Federal Courts to Apply a Threshold Lower than the Overwhelming Number of State Bars, Creating an Inappropriate Tension within the Federal System, Compounding the Constitutional Infirmities Posed by the Rule.**

The "reasonable likelihood" federal court standard applied here is out of sync with the overwhelming consensus among state bars. This Court noted in *Gentile* that as of 1991 only 11 of the 50 states applied the "reasonable likelihood" test. *Gentile*, 501 U.S. at 1068 n. 2 (listing Alaska, Colorado, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, Ohio, Tennessee, Vermont, and North Carolina). Since *Gentile*, four of those states have defected; three adopting "substantial likelihood of material prejudice" and one an even higher standard of grave and imminent harm. *See Alaska Rules of Prof. Conduct*, Rule 3.6 ("substantial likelihood of material prejudice"); *Hawaii Rules of Prof. Conduct*, Rule 3.6 (same); *Ohio Code of Professional Responsibility*, DR 7-107 (same); *Colorado Rules of Prof. Conduct*, Rule 3.6 ("grave danger of imminent and substantial harm.").

While First Amendment doctrine is not determined by opinion poll, the judgment and experience of these forty-three states is powerful evidence that the judicial system is not imperiled by standards providing more generous free speech protection than the Eastern District of Virginia. But more significantly, to the extent that a significant number of federal courts continue to adhere to the reasonable likelihood

standard, a troublesome dissonance exists between state and federal practice.

According to Petitioner's research, of the forty-eight federal district courts which appear to have rule provision on point, only six use the "substantial likelihood of material prejudice" standard.[8] Four districts use the "serious and imminent threat" test or some variation of it.[9] An alarming thirty-seven districts continue to use the "reasonable likelihood" standard.[10] And, one district uses a "might interfere" test.[11]

The historical explanation for this dissonance is easy enough to trace. Most federal district courts have patterned their local rules after the recommendations in 1976 of the "Seitz Committee," chartered by the Judicial Conference and chaired by Chief Judge Seitz of the Third Circuit, which recommended the "reasonable likelihood" standard. *See*

---

[8] Districts employing the "substantial likelihood of material prejudice" standard, or some variation thereof, include: N.D. Fla., Rule 77.3; D. Neb., Rule 83.1; D.N.J., Rule 101.1; S.D.N.Y., Rule 23.1; E.D.N.Y., Rule 23.1; D. Utah, Rule 313.

[9] Districts employing the "reasonable likelihood of prejudice" standard, or some variation thereof, include: D. Alaska, Rule 4; D. Ariz., Rule 4.13; D.D.C., Rule 308; D. Conn., Rule 13; M.D. Fla., Rule 4.10; S.D. Fla., Rule 77.2; N.D. Ga., Rule 57.4; S.D. Ga., Rule 253; D. Idaho, Rule 62.1; S.D. Ill., Rule 23; N.D. Iowa, Rule 28; S.D. Iowa, Rule 28; D. Kan., Rule 53.1; D. Me., Rule 157.4; D. Md., Rule 204; D. Mass., Rule 83.2A; W.D. Mo., Rule 99.7; D. Mont., Rule 130; D.N.H., Rule 57.1; D.N.M., 55.2; E.D.N.C., Rule 45; M.D.N.C., Rule 305; W.D.N.C., Rule 11; D.N.D., Rule 77.3; N.D. Ohio, Rule 57.1; N.D. Okla., Rule 57.1; E.D. Okla., Rule 57.1; E.D. Pa., Rule 12; M.D. Pa., Rule 102; W.D. Pa., Rule 83.2; D.P.R., Rule 109; D.R.I., Rule 39; D.S.C., Rule 83.III.02; E.D. Tenn., Rule 83.2(b); W.D. Tex., Rule AT-5(c); E.D. Va., Rule 57; W.D. Wash., Rule CrR 53.

[10] Districts employing the "clear and present danger" standard, or some variation thereof, include: N.D. Ill., Rule 1.07; N.D. Ind., Rule 103.1; S.D. Ind., Rule 5.1; M.D. Tenn., Rule 3.

[11] S.D. Ohio, Rule 104 (using "might interfere").

*Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 87 F.R.D. 519 (1980). Inertia can be formidable. Most federal districts have simply neglected to revisit their rules and bring them into conformity with the mandate of *Gentile*.

This federal/state dissonance undoubtedly surfaced in Morrissey's case, in which the prosecution of his client initially commenced within the Virginia state system, one of the states that applies the "clear and present danger" test. *See Va. Code of Professional Responsibility*, DR 7-106(A). A change of venue should not result in a change in the First Amendment.

### C. This Court's Unique Leadership Role in Relation to the Both the Legal Profession and the Management of the Federal Judicial System Is a Factor that Should Weigh Significantly in Favor of Granting this Petition.

If this Petition presents the sequel to *Gentile*, it is in some respects a predictable and inevitable sequel. That a "*Gentile* II" would someday surface was perhaps foreordained by the unusual alignment of opinions in the case.[12] The American Bar Association in 1991 understood the proper meaning of *Gentile*. *See ABA Standards for Criminal Justice, Fair Trial and Free Press* 5 (1991) ("substantial likelihood of material prejudice" standard applies in light of *Gentile*). So too, the Department of Justice, when advising its own lawyers, has internalized the

---

[12] The ambiguity that some lower courts have perceived and then exploited may have been exacerbated by the atypical disposition of *Gentile*; for while holdings of this Court delivered through a combination of a plurality opinion and separate concurrences are not uncommon, the happenstance in *Gentile*, in which two opinions of the Court are written by different members of the Court each commanding differently constituted five-Justice majorities, is quite rare.

substantial likelihood standard. *See United States Attorneys' Manual*, § 1-7.510 (proscribing statements that will have a "substantial likelihood of materially prejudicing an adjudicative proceeding).

Yet while the Petitioner strenuously submits that *Gentile* does not countenance a First Amendment standard lower than "substantial likelihood of material prejudice," Petitioner concedes, as he must, that not everyone has gotten the message. To the extent *Gentile's* message had not been clearly understood, it is especially incumbent on this Court to intervene and clarify it.

Against this backdrop of conflict over the meaning of *Gentile*, the factors mitigating in favor of granting this Petition are especially forceful. Throughout its history this Court has, in both substance and symbol, occupied a central leadership role in shaping the standards of the legal profession, particularly within the federal judicial system. This Court is not merely the final arbiter of substantive federal law, with the emphatic province and duty "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), it is also an ongoing source of leadership for the standards of evidence, procedure, and professional conduct that form the sinew of the practice of law in America. When a standard of professional conduct intersects with constitutional principle, the impact is synergistic, and the logic of this Court's intercession compelling.

It is no accident that this Court has entertained so many First Amendment cases pertinent to the disciplinary standards that govern lawyers. *See, e.g., In re Sawyer*, 360 U.S. 622 (1959); *Konigsberg v. State Bar of California*, 367 U.S. 1 (1961); *NAACP v. Button*, 371 U.S. 415 (1963); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *In re Primus*, 436 U.S. 412 (1978); *In re RMJ*, 455 U.S. 191 (1982); *Shapiro v. Kentucky Bar Association*, 486 U.S. 466 (1988); *Peel v. Attorney Registration and Disciplinary Commission of Illinois.*, 496 U.S. 91 (1990); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978); *Florida Bar v.*

*Went For It, Inc.*, 515 U.S. 618 (1995). Nor is it any accident that this Court has so often intervened in First Amendment cases governing the conduct of the legal system. *See, e.g., Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947); *Schware v. Board of Examiners of the State of New Mexico*, 353 U.S. 232 (1957); *Wood v. Georgia*, 370 U.S. 375 (1962); *Nebraska Press Association. v. Stuart*, 427 U.S. 539 (1976); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press Enterprise II*); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); ain *Butterworth v. Smith*, 494 U.S. 624, 632 (1990).

### D. This Court Should Reinforce and Clarify Gentile, Providing Lower Courts with Guidance and Attorneys with the Minimum Protections Required by the First Amendment

Justice Oliver Wendell Holmes taught that the life of the law is not logic but experience. Oliver Wendell Holmes, *The Common Law* 1 (1881). And the experience of American law is that lawyers largely live by talking, not just at the courthouse, negotiation table, and office, but in the public arena. The lawyers's role in this society cannot be separated from the nature of the society itself. *See* Lawrence Friedman, *A History of American Law* (2nd ed. 1985). America today is a rich and thriving marketplace of discourse, often tough, biting, and abrasive. In fulfilling the lawyer's obligation to represent a client's interest with zeal, the lawyer must often enter the arena with zeal. This is particularly true of the criminal defense bar. Criminal defense is no calling for shrinking violets, and members of the criminal defense bar have "the professional mission to

challenge actions of the State." *Gentile*, 501 U.S. at 1051 (Opinion of the Court by Justice Kennedy). Law is the public's business and lawyering often requires bringing the law's perceived abuses to the public's attention, including often caustic attacks on the motives of prosecutors or the weaknesses of the prosecution's case. Under the First Amendment publicity is not innately suspect, but inherently protected. *See In re Oliver*, 333 U.S. 257, 270-271 (1948). ("The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . . Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.").

It is not enough to protest that cases "should not be tried in the media." Of course they should not. But invocation of that cliche is not sufficient to defeat the values of the First Amendment. And the essential value here is that lawyers *should* have the right to freely discuss cases in the media, to participate in today's predictable rough-and-tumble rituals of sniping charges and counter-charges, posturing and protesting, unless the prospect of some *substantial likelihood* of *material prejudice* to the pending proceeding is actually demonstrated. This is the balance struck in *Gentile*. This is the balance required by the First Amendment.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

JOSEPH D. MORRISSEY

Rodney A. Smolla
*Counsel of Record*
T.C. Williams School of Law
University of Richmond
Richmond, Virginia 23173
(804) 289-8197

Everette G. Allen, Jr.
HIRSCHLER, FLEISCHER,
WEINBERG, COX
& ALLEN, P.C.
701 East Byrd Street
P.O. Box 500
Richmond, Virginia 23218-
(804) 771-9500

David B. Hargett
MORRISSEY, HERSHNER
& JACOBS
Seven South Adams Street
Richmond, Virginia 23220
(804) 788-1956

*Counsel for Petitioner*

## TABLE OF CONTENTS
### Appendix to the Petition

Opinion,
United States Court of Appeals
for the Fourth Circuit
entered February 11, 1999 ..... App. 1

Order,
United States District Court
for the Eastern District of Virginia
Richmond, Virginia
entered March 12, 1999 ..... App. 14

Memorandum Opinion,
United States District Court,
Eastern District of Virginia,
Richmond Division
entered February 24, 1998 ..... App. 15

Order Denying
Petition for Rehearing and
Rehearing En Banc,
United States Court of Appeals
for the Fourth Circuit
entered March 10, 1999 ..... App. 40

Relevant Portions of
Local Criminal Rule 57(C)
United States District Court
for the Eastern District of Virginia ..... App. 41

**PUBLISHED**

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

In Re: JOSEPH D. MORRISSEY,
Appellant.

No. 98-4168

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert E. Payne, District Judge.
(MISC-97-16)

Argued: October 28, 1998
Decided: February 11, 1999
Entered: February 11, 1999

Before ERVIN and HAMILTON, Circuit Judges, and MOON, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Ervin wrote the opinion, in which Judge Hamilton and Judge Moon joined.

**COUNSEL**

**ARGUED:** David Bernard Hargett, MORRISSEY, HERSHNER & JACOBS, Richmond, Virginia, for Appellant. Andrew Gerald McBride, Assistant United States Attorney, Richmond, Virginia, for Appellee. **ON BRIEF:** J. Paul Gregorio, MORRISSEY, HERSHNER & JACOBS, Richmond, Virginia; Everette Garrett Allen, Jr., HIRSCHLER, FLEISCHER, WEINBERG, COX & ALLEN, Richmond, Virginia, for Appellant. Helen F. Fahey, United

States Attorney, David J. Novak, Assistant United States Attorney, Richmond, Virginia, for Appellee.

**OPINION**

ERVIN, Circuit Judge:

Prior to a criminal trial in which he was a participating lawyer, Virginia attorney Joseph D. Morrissey ("Morrissey") made extrajudicial statements to the media regarding the case. Based on these actions, Morrissey was convicted of two counts of criminal contempt for violating Local Criminal Rule 57 ("Local Rule 57") of the United States District Court for the Eastern District of Virginia.

This case presents the question of whether Local Rule 57, which restricts a lawyer's extrajudicial comments about pending litigation, is facially unconstitutional because it violates an attorney's First Amendment right to free speech. The district court found that Local Rule 57 did not offend the First Amendment and denied Morrissey's motion to dismiss the contempt charges pending against him. Morrissey appeals. For the reasons set out below, we affirm.

I.

On January 16, 1997, Joel W. Harris ("Harris") was indicted on state drug distribution charges. Immediately following his indictment, Harris hired Morrissey, an experienced trial lawyer and former Commonwealth of Virginia prosecutor, as his attorney. Harris is a long-time Richmond political operative and former mayoral aide. His indictment attracted substantial media attention throughout the area.

Given Harris' political connections, the prosecution was dogged by accusations of partisanship on the part of the Commonwealth[1] officials investigating the case. Eventually

---

[1] Although Virginia is officially a Commonwealth rather than a state, we will hereafter use the word state in order to draw a clear line between

this political pressure impeded the investigation and federal authorities took over, moving the case to federal court.

As part of his trial preparation, Morrissey hired investigator James Bates ("Bates") to help him determine the identity of the witnesses who testified against Harris before the state grand jury. Bates identified John Buerkley ("Buerkley") as one of the grand jury witnesses and arranged an interview between Morrissey and Buerkley. During the videotaped interview, Buerkley recanted much of his state grand jury testimony. Neither party disputes the fact that they were aware Buerkley would be called as a government witness during trial.

Two days after this interview, Harris was indicted on federal drug distribution charges. The indictment alleged that Harris had exchanged drugs for sexual favors. These salacious details generated an even greater media frenzy in the geographic area from which jurors for the federal case would be drawn and in which key witnesses lived.

On the same day of Harris' indictment, the Assistant United States Attorney assigned to the case, James B. Comey ("Comey"), sent Morrissey a copy of the indictment and a copy of Local Rule 57. Comey felt the need to remind Morrissey of the applicability of Local Rule 57 because Morrissey had a reputation for aggressive use of the media in high-profile cases, and because comments similar to the ones that Morrissey had previously made during the state proceedings would be prohibited in federal court under this rule.

On the morning of February 11, 1997, John Honey ("Honey"), counsel for another potential witness against Harris, called Morrissey to caution him against approaching Honey's client directly for an interview. In that conversation, Morrissey indicated that he had scheduled a press conference for later that afternoon and planned to show the videotape of Buerkley recanting his grand jury testimony. Morrissey also

---

the state and the federal prosecutors.

told Bates and Buerkley's attorney Augustus Hydrick ("Hydrick") about the planned press conference. Both Hydrick and Bates discouraged Morrissey from holding the press conference for fear it would jeopardize their chances to convince any other witnesses to talk to them. Hydrick testified that Morrissey said he needed to do this in order to send a message to the other witnesses. Comey also found out about the press conference and faxed Morrissey a letter that again cited Local Rule 57 and urged him to cancel the press conference.

Morrissey went ahead with the press conference. He made some remarks, presented a press release, and played the videotape of Buerkley's recantation. The press conference received extensive media coverage throughout the Richmond area.

Later that afternoon, Morrissey responded to Comey's letter claiming that he had discussed Local Rule 57 with three former prosecutors and, based on their conversations, decided to hold the press conference. Later, during the show cause hearings, the three attorneys Morrissey spoke with all denied that they had advised him to go forward with the press conference.

In further support of his actions, Morrissey insisted that his statements to the media dealt only with the state case and the tainting of witnesses before the state grand jury. At that point, all state charges against Harris had been dismissed and only federal charges remained. According to Bates, Morrissey called the press conference to shake other witnesses, or as Morrissey put it, to induce others to come forward. Instead, these acts rattled several potential witnesses. One even threatened to recant his testimony just to avoid having to testify during trial.

The day after the press conference, the first show cause order was issued against Morrissey by District Court Judge James R. Spencer. The order charged him with willfully violating Local Rule 57 by holding a press conference to discuss information about and the credibility of a prospective

government witness in a pending criminal proceeding. At Morrissey's February 19 show cause hearing, the district court judge reminded both parties of Local Rule 57 and promised harsh punishment for future violators.

On March 4, two weeks before the trial, Morrissey again made public statements about the Harris case in an interview with a Richmond newspaper reporter. Morrissey characterized the charges against Harris as vicious and vindictive and questioned whether they ever should have been filed. He went on to remark that if these charges had been filed when he was a prosecutor, they would have been laughed out of court. Based on these comments, a second show cause order was issued against him. Again, Morrissey was charged with willfully violating Local Rule 57 by making comments to a newspaper reporter regarding the merits of Harris' pending case. Morrissey moved to dismiss the show cause orders, arguing that Local Rule 57 impermissibly infringed upon his right to free speech. On October 27, 1998, the district court denied the motion to dismiss on First Amendment grounds and conducted a bench trial on the charges.

At trial, the district court found that Morrissey knowingly violated Local Rule 57, specifically sections (C)(4) and (C)(6), which prohibit lawyers from making public statements regarding the identity, testimony, or credibility of prospective witnesses; or from giving any opinion as to the merits of a pending case. The court held that Morrissey's actions were reasonably likely to taint the jury pool, to make jury selection more difficult, and to interfere with prospective witnesses. Morrissey was found guilty of two violations of Local Rule 57 and sentenced to ninety days imprisonment and three years probation. Morrissey was also suspended from practicing law in the Eastern District of Virginia for two years. Morrissey appeals the district court's finding that Local Rule 57 does not violate the First Amendment.

II.

We review the district court's legal conclusion that Local Rule 57 is constitutional de novo. See Gentile v. State Bar of Nevada, 501 U.S. 1030, 1038 (1991) (encouraging the appellate court to review the entire record). In cases raising First Amendment challenges, "an appellate court has an obligation to `make an independent examination of the whole record' in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'" Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964)).

Morrissey argues that Local Rule 57[2] is facially unconstitutional because its restrictions on a lawyer's

---

[2] In relevant part, Local Rule 57 provides:

> (A) Potential or Imminent Criminal Litigation: In connection with pending or imminent criminal litigation with which a lawyer or a law firm is associated, it is the duty of that lawyer or firm not to release or authorize the release of information or opinion (1) if a reasonable person would expect such information or opinion to be further disseminated by any means of public communication, and (2) if there is a reasonable likelihood that such dissemination would interfere with a fair trial or otherwise prejudice the due administration of justice.
>
> * * * * * *
>
> (C) Pending Criminal Proceedings--Specific Topics: From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the termination of trial or disposition without trial, a lawyer or a law firm associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement which a reasonable person would expect to be further disseminated by any means of public communication, if such statement concerns:

freedom of speech impermissibly infringe on Morrissey's First Amendment rights as interpreted by the Supreme Court in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991). Specifically, Morrissey argues that because the Court in Gentile held that the "substantial likelihood" standard was narrowly tailored enough to strike the proper balance between protecting the right to a fair trial and a lawyer's right

---

> (1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation, and family status and, if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his or her apprehension or to warn the public of any dangers such person may present;
>
> (2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;
>
> (3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;
>
> (4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;
>
> (5) The possibility of a plea of guilty to the offense charged or a lesser offense;
>
> (6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

D. E.D.V. R. 57.

to freedom of speech, the less protective "reasonable likelihood" standard in Local Rule 57 cannot also be sufficiently narrowly tailored to withstand a constitutional challenge.

We addressed the constitutionality of a rule very similar to Local Rule 57 in Hirschkop v. Snead, 594 F.2d 356 (1979), a pre-Gentile case. In Hirschkop, we found the "reasonable likelihood" standard to be sufficiently narrowly tailored so as not to violate the First Amendment. Morrissey argues that Gentile silently overruled Hirschkop and thereby rendered the "reasonable likelihood" standard unconstitutional. As a threshold matter, we must determine if Gentile silently overruled Hirschkop.

A.

In Hirschkop, Virginia attorney Phillip J. Hirschkop filed a declaratory judgment action challenging the constitutionality of a local rule identical to Disciplinary Rule 7-107(b) ("DR 7-107(b)") of the American Bar Association's Code of Professional Responsibility. His challenge was brought on grounds that the rule, which applied the "reasonable likelihood" standard, impermissibly restricted lawyer's speech in violation of the First and Fourteenth Amendments. Hirschkop, 594 F.2d at 362. Local Rule 57 is very similar to DR 7-107 in that it enumerates six specific categories of extrajudicial statements that are expressly prohibited during pending criminal trials if they are judged to be reasonably likely to materially prejudice the due administration of justice.

This Court upheld the "reasonable likelihood" standard as constitutional. First, this Court established that the rule furthered the important governmental interest of protecting both the accused's and the public's right to a fair trial. See id. at 363-64. Next, this Court turned its attention to whether the rule imposed unnecessarily broad restrictions. See id. at 364-70. Since there were six enumerated categories of

restricted statements prohibited only if reasonably likely to prejudice the trial, this Court was satisfied that the rule was narrowly drawn and provided attorneys with sufficient notice of what they could and could not publicize. See id. at 367-68.

As we acknowledged in Hirschkop, the Seventh Circuit previously found the "reasonable likelihood" standard to be unconstitutional, but we explicitly rejected its reasoning and declined to follow its lead. See id. at 370 (acknowledging and rejecting the Seventh Circuit's holding in Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), that the "reasonable likelihood" test is unconstitutional). In our opinion, "the reasonable likelihood test divides the innocuous from the culpable, adds clarity to the rule and makes it more definite in application." See id. at 370.

Five years later, we reaffirmed the reasoning in Hirschkop when we considered whether an order prohibiting witnesses from making statements to the media about their testimony unconstitutionally infringed upon the witnesses' First Amendment rights. See In re Russell, 726 F.2d 1007, 1010-11 (4th Cir. 1984). In Russell, we applied the "reasonable likelihood" test and held that the order under consideration in that case was unconstitutional. Id.

Fourteen years after Hirschkop, the Supreme Court considered the constitutionality of a similar disciplinary rule prohibiting lawyer speech that would have a "substantial likelihood of materially prejudicing an adjudicative proceeding." Gentile , 501 U.S. at 1062-63. The Court in Gentile emphasized the importance of the governmental interest protected by such rules, stating that "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by `impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." Id. at 1075. Chief Justice Rehnquist, writing for the Court, focused on the high costs to society of extrajudicial statements including the need for new trials, for changes of venue, and for extensive voir dire examination,

and found that too often even these expensive and time consuming measures could not cure the damage caused by such careless statements. See id.

The Court then examined the "substantial likelihood" standard to determine if it was sufficiently narrowly tailored to avoid infringing on the First Amendment rights of lawyers. The Court found the Nevada rule to be narrow enough because (1) it restricted speech without regard to the point of view expressed in the speech, (2) it applied equally to all attorneys participating in the case, (3) it only postponed the attorney's comments until after the trial, and (4) it only applied to speech that was substantially likely to have a materially prejudicial effect. See id. at 1076.

Morrissey correctly points out that both the plurality and concurring opinions in Gentile agreed that the"substantial likelihood" standard struck a constitutional balance between the right to a fair trial and an attorney's First Amendment rights. Gentile, 501 U.S. at 1075, 1082 (O'Connor, J., concurring). It cannot be said, however, as Morrissey argues, that Gentile stands for the proposition that the "substantially likely" standard is the only constitutionally permissible standard for restrictions on lawyer speech under the First Amendment.

In dicta, the Court acknowledged the existence of different standards, including the "reasonable likelihood" standard in place in eleven states. See id. at 1068. It did not, however, as Morrissey insists, make any attempt to evaluate the constitutionality of any test other than the "substantially likely" standard as presented in that case. See id. Nor is Morrissey's interpretation of Gentile supported by the Court's comment in dicta that the "reasonable likelihood" standard is "less protective of lawyer speech." Id. at 1067.

The Second Circuit has come to the same conclusion. In United States v. Cutler, 58 F.3d 825 (2d Cir. 1995), the Second Circuit explicitly followed this Court's reasoning in Hirschkop and upheld the constitutionality of a local rule identical to Local Rule 57. See id. at 835. That court cited

Gentile throughout its decision, but never discussed the Supreme Court's mention of the "reasonable likelihood" standard as less protective of lawyer speech, nor did it reason that a rule employing the "reasonable likelihood" standard was unconstitutional. Id. at 836-37.

We agree with the Second Circuit's reasoning in Cutler and hold that Gentile and Hirschkop are consistent with one another. We decline to accept Morrissey's argument that we should find that, through its silence, the Supreme Court in Gentile overruled our prior holding in Hirschkop. Further, we discourage reliance on such a premise, for we believe arguing that a precedent has been overruled through a court's silence is a disfavored enterprise within this circuit.

B.

After determining that Gentile does not overrule Hirschkop, we endeavor to illustrate that the "reasonable likelihood" standard is sufficiently narrowly tailored to pass constitutional muster and was constitutionally applied to Morrissey.

Under the First Amendment, content-based restrictions on attorney speech are permissible only when they are no greater than necessary to protect an accused's right to a fair trial or an impartial jury. See Procunier v. Martinez, 416 U.S. 396, 413 (1974). In Procunier, the Supreme Court established that for a regulation proscribing lawyer speech to be constitutional, it "must further an important or substantial government interest unrelated to the suppression of expression . . . [and] the limitation on First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." Id. 416 U.S. at 413.

There is little doubt in this case that the first part of the Procunier test is met. Courts have agreed that protecting the right to a fair criminal trial by an impartial jury whose considerations are based solely on record evidence is a

compelling state interest. See Gentile, 501 U.S. at 1075; Sheppard v. Maxwell, 384 U.S. 333, 362 (1966); Hirschkop v. Snead, 594 F.3d 356, 363 (4th Cir. 1979). Therefore, the real question is whether the restriction applied to lawyer speech in Local Rule 57 is narrowly tailored enough to be no greater than necessary to protect the government interest involved. The restrictions on Morrissey's First Amendment rights as imposed by Local Rule 57 are both narrow and necessary. Local Rule 57 is narrow in that it prohibits only the statements that are likely to threaten the right to a fair trial and an impartial jury. The text of the rule explicitly lists six limited categories of prohibited speech that represent only the statements the Supreme Court established in Sheppard as most likely to cause prejudice in adjudicative proceedings. See Sheppard , 384 U.S. at 361-62.

In addition, Gentile states that limitations on lawyer speech must be aimed at the two evils that threaten the integrity of the judicial system. Those evils are (1) comments that will likely influence the outcome of a trial and (2) statements that will prejudice the jury venire even if an untainted jury panel can eventually be found. See Gentile, 501 U.S. at 1075. Morrissey's press conference publicly called into question the credibility of a key witness in Harris' case, an action that would likely influence the outcome of the trial. Further, in his later statements to the reporter he cast doubt on the strength of the government's case and in doing so relied on his expertise as a former prosecutor. These comments went directly to the merits of the case. Both of these actions are precisely the types of behavior that the Court in Gentile was concerned about and thought could and should be prohibited.

Finally, Gentile states that for a rule restricting lawyer speech to be narrowly tailored it must be neutral as to points of view, apply equally to all attorneys in the case, and only postpone lawyers' comments until after the trial. Id. at 1075-76. Local Rule 57 makes no distinctions based on point of view nor does its prohibition on speech last any longer

than the trial. The rule also applies to all lawyers or law firms participating on either side of the pending litigation. Local Rule 57, like the rule evaluated in Gentile, satisfies each of the elements required for constitutionally adequate protection and therefore does not impermissibly infringe on a lawyer's First Amendment rights.

III.

Local Rule 57 is aimed at securing the right to a fair trial by an impartial jury and avoiding conduct that imposes unnecessary costs on the judicial system. The language of the rule accomplishes these objectives by imposing a constitutionally permissible restriction on lawyer speech. This Court's ruling in Hirschkop is controlling in this matter and as such Local Rule 57 is not facially unconstitutional. We affirm the district court's ruling that Local Rule 57 is constitutionally valid on its face and as applied to Morrissey.

AFFIRMED

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Richmond Division**

IN RE:

JOSEPH D. MORRISSEY, ESQUIRE

Criminal No. 3:97MS16
Entered: March 12, 1999

**ORDER**

For the reasons set forth on the record during the hearing on March 4, 1999, it is hereby ORDERED that the Government's Motion to Revoke Bond After Resolution of Appeal is DENIED and the conditions of release on bond pending appeal shall remain in effect; provided that the defendant shall have filed a petition for a writ of certiorari with the Supreme Court of the United States not later than April 5, 1999; and, if such a petition is filed by that date, the defendant shall remain on release during the pendency of said petition, under the same conditions of release on bond pending appeal, until the Supreme Court disposes of the petition for a writ of certiorari.

The Clerk is directed to send a copy of this Order to all counsel of record. The Clerk shall not distribute copies by "electronic or computer means" unless explicitly directed.

It is so ORDERED.

/s/Robert E. Payne
United States District Judge

Date: Mar 12, 1999
Richmond, VA

996 F.Supp. 530

**In Re: JOSEPH D. MORRISSEY.**

**No. CRIM. 3:97MS16.**

United States District Court, E.D. Virginia,
Richmond Division.

Entered: Feb. 24, 1998.

Everett G. Allen, Robert L. Harris, Jr., Hirschler, Fleischer, Weinberg, Cox & Allen, Richmond, VA, for John D. Morrissey.

David Novak, Assistant United States Attorney, Office of the United States Attorney, Richmond, VA, for United States.

## MEMORANDUM OPINION

PAYNE, District Judge.

The defendant, Joseph D. Morrissey, a member of the bar of Virginia and the bar of this Court, stands convicted of two counts of contempt of court which were instituted by show cause orders on February 12, 1997 and April 9, 1997, respectively. In each show cause order, Morrissey was directed to show cause why he should not be found guilty of criminal contempt for willfully, intentionally, and contumaciously violating Local Criminal Rule 57(C) of the United States District Court for the Eastern District of Virginia ("Local Rule 57(C)"). The charges were tried to the Court sitting without a jury. The findings of conviction were

fully documented on the record on October 31, 1997 [1] and are incorporated by reference herein.

Before trial, Morrissey moved to dismiss the show cause orders on the ground that Local Rule 57(C) violated the right of free speech secured to him by the First Amendment. For the reasons set forth below, the Court holds that Local Rule 57(C) does not offend the First Amendment and denies the motion to dismiss the contempt charges.

## I. THE LOCAL RULE

In relevant part, Local Rule 57 provides:

> (A) **Potential or Imminent Criminal Litigation:** In connection with pending or imminent criminal litigation with which a lawyer or a law firm is associated, it is the duty of that lawyer or firm not to release or authorize the release of information or opinion (1) if a reasonable person would expect such information or opinion to be further disseminated by any means of public communication, and (2) if there is a reasonable likelihood that such dissemination would interfere with a fair trial or otherwise prejudice the due administration of justice.
>
> * * * * * *
>
> (C) **Pending Criminal Proceedings--Specific Topics:** From the time of arrest, issuance of an arrest warrant, or the filing of a

---

[1] The trial of the contempt charges against Morrissey was delayed with the agreement of all concerned to avoid prejudice in the trial of Morrissey's client, Joel W. Harris, who was under indictment in the criminal case in which Morrissey committed the contempts of which he was convicted.

complaint, information, or indictment in any criminal matter until the termination of trial or disposition without trial, a lawyer or a law firm associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement which a reasonable person would expect to be further disseminated by any means of public communication, if such statement concerns:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation, and family status and, if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his or her apprehension or to warn the public of any dangers such person may present;

(2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

* * * * * *

(D) **Pending Criminal Proceedings--General:** During a jury trial of any criminal matter, including the period of selection of the jury, no lawyer or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview relating to the trial or the parties or issues in the trial, which a reasonable person would expect to be disseminated by means of public communication, if there is a reasonable likelihood that such dissemination will interfere with a fair trial, except that the lawyer or law firm may quote from or refer without comment to public records of the Court in the case.

## II. STATEMENT OF FACTS

The charges in this case have historical antecedents in the state court and, therefore, it is necessary briefly to sketch the background of the state court proceedings which began on January 16, 1997 when Joel W. Harris was indicted by a state grand jury on drug distribution charges. Morrissey almost immediately undertook the defense of Harris in the state case.

Harris was active in state and local politics. Consequently, his indictment for distributing controlled substances spawned substantial attention from the print and broadcast media. It also generated a rather shameless display of lawyer-generated publicity. It is safe to say that the constant flow of media attention created a circus-like atmosphere.

After the state proceedings became heavily laden with well-publicized accusations and counter-charges respecting the political motivations of the participants and of various local law enforcement officials, federal authorities took over the investigation. Thus, by January 21, 1997, a federal

investigation of Harris' activities was well-underway and, on that date, Morrissey and Harris met with the lead federal prosecutor, James B. Comey, for a proffer session in which the somewhat broadened range of charges under federal investigation were discussed. Meanwhile, Morrissey continued to investigate and prepare a defense to the still pending state charges.

As part of that preparation, Morrissey, Harris and Morrissey's investigator, James Bates, sought to ascertain the identity of witnesses against Harris by reviewing the state court indictment and the allegations in an affidavit in support of a state search warrant. One of the witnesses identified by this process was John Buerkley, who had testified against Harris before the state grand jury. Bates arranged for Morrissey to interview Buerkley on February 2, 1997. During that interview, which was consensually recorded on videotape, Buerkley recanted some of the testimony he had given to the state grand jury.

Two days later, February 4, Harris was indicted by a federal grand jury on drug distribution charges allegedly involving the exchange of drugs by Harris in return for sexual favors, heterosexual and homosexual. Needless to say, the charges were of great interest to the already rather sensational reporting which now could add a salacious overlay to the coverage of the drug distribution charges against a political figure said to possess significant behind-the-scenes influence in local and state political circles. Indeed, by then even the most poorly informed of the Richmond area populace could discern that any story about the Harris case would attract the attention of a ravenous media which, quite predictably, would thrust the information into broadcast sound bites and newspaper headlines. Morrissey, an experienced criminal trial lawyer, knew full well that any news about his client's case would receive substantial broadcast and print media exposure in the geographic area from which juries for this Court are drawn and in which witnesses in the case resided.

Indeed, because Morrissey had so actively communicated to the press his opinions and theories about the charges against Harris in the state proceedings, Comey provided Morrissey with a copy of Local Rule 57(C) when he delivered the federal indictment to Morrissey on February 4. Comey also reminded Morrissey that the Local Rule prohibited the kind of communication with the press in which Morrissey had engaged in the state case (GX 12).

The next day, February 5, found Harris before a United States Magistrate Judge of this Court for a detention hearing. During the course of that proceeding, Morrissey expressed awareness that Buerkley was a potential witness in the federal case against him. Also, on February 5, Augustus S. Hydrick, Jr., counsel for Buerkley, confirmed to Morrissey that Buerkley would be a witness in the federal case.

On February 7, the state prosecutor filed a motion to nolle prosse all state charges against Harris. On February 10, the motion was granted. Nonetheless, Morrissey attempted to schedule hearings in state court on a motion seeking return of some of Harris' seized property. However, the state judge declined to set a hearing on that motion because all state proceedings against Harris had been terminated, thereby depriving the state court of jurisdiction with respect to Harris and the motion to recover the seized property.

On February 10, Comey informed Hydrick that he intended to call Buerkley as a witness in the federal case, notwithstanding the recent recantation by Buerkley of his state grand jury testimony in the videotaped interview with Morrissey. Also, on February 10, Bates attempted to communicate with another witness, Teri Czelusniak, who had been identified by Morrissey, Bates and Harris in their review of the state court indictment and the search warrant affidavit. Czelusniak, however, was disturbed by the efforts of Bates to arrange an interview with Morrissey and informed her counsel, John K. Honey, Jr.

On the morning of February 11, Honey informed Morrissey of Czelusniak's concerns and directed Morrissey to make certain that all communications on this topic were with Honey, not Czelusniak. During that conversation, Morrissey also told Honey that Buerkley would be a witness in the pending proceedings. Although Morrissey did not mention the federal proceedings by name, the federal case was the only one then pending.

During the conversation with Honey on February 11, Morrissey also disclosed that he had convened a press conference for later in the day. Almost immediately thereafter, Honey passed that information along to Comey.

Later, on February 11, between 10:00 and 11:00 a.m., in a telephone conference with Morrissey, Hydrick learned that, at a press conference to be held later that day, Morrissey intended to show the videotape in which Buerkley had recanted part of his testimony before the state grand jury. Hydrick implored Morrissey not to release the videotape to the media because of the adverse effect it likely would have on Buerkley, on his family and on Hydrick's pending negotiations with the federal prosecutors on behalf of Buerkley. Morrissey's investigator, Bates, also asked Morrissey not to release the videotape to the media because to do so would be a breach of faith with Buerkley and would make it difficult, if not impossible, for Bates to arrange access to other witnesses.

Morrissey declined these requests because, as Morrissey put it to Hydrick, release of the videotape to the media was necessary to "send a message to other witnesses." The only persons who, on February 11, qualified as "other witnesses" were those involved in the pending federal case, *United States v. Harris*. Hydrick then passed this information along to Comey, as he continued to negotiate on behalf of Buerkley.

Comey reacted by sending a facsimile letter, asking Morrissey not to hold a press conference, citing Local Rule 57(C), subsections (4) and (6), as the reason. At trial,

Comey testified that a principal reason for his entreaty to Morrissey was to forestall problems in jury selection in *United States v. Harris* such as those which had arisen in a recently tried, high profile criminal case, *United States v. Beckford,* wherein it was necessary to excuse almost an entire jury panel because of pretrial publication of the grand jury testimony of a key prosection witness. In that letter, Comey informed Morrissey that Buerkley was a prospective government witness in *United States v. Harris* and emphasized that Local Rule 57(C) "strictly forbids 'any extrajudicial statement ... if such statement concerns: ... (4) The identity, testimony, or credibility of prospective witnesses ... [or] (6) Any opinion as to ... the merits of the case or the evidence in the case.' " (GX 14).

Before Morrissey replied to Comey, he presented Buerkley's recantation testimony at a press conference at 3:00 p.m. and distributed the press release on that subject. Part of the press conference, some of Buerkley's testimony, and part of the press release appeared on the evening television news and in the next day's edition of the newspaper. Both the broadcast and print media are published in the geographic area from which jurors in this Court are selected and in which witnesses in Harris' case resided.

Shortly after the press conference, Morrissey replied to Comey's letter by facsimile. Notwithstanding that the state case had been dismissed and that the state judge had declared the matter ended, Morrissey, in that letter, defended his decision to release Buerkley's testimony to the media and to go forward with the press release and the press conference by stating that they concerned "only the Commonwealth of Virginia's case against Mr. Harris and the tainting of witness [sic] brought before the [state] Multi-jurisdictional grand jury." And, in remarkable disregard of the undeniable truth that, (1) at the February 5 detention hearing in *United States v. Harris,* Morrissey himself had described Buerkley as a government witness and (2) that Comey's letter describes

Buerkley as a "potential government witness," Morrissey told Comey that "I have not commented on any witnesses known to be called in the [sic] Mr. Harris' federal trial nor do I intend to ." (GX 15). All the while, as evidenced by the press release which accompanied that statement, Morrissey already had released to the media the videotape of Buerkley's interview with Morrissey.

Morrissey's reply to Comey also acknowledged that he had reviewed Local Rule 57(C). In implied support of his decision to release, and comment upon, Buerkley's testimony, Morrissey informed Comey that: "I have also discussed said rule [Local Rule 57(C)] with three former prosecutors."

Morrissey's discussions with others can hardly be said to lend support to his decision to release, and comment upon, Buerkley's testimony. For example, one former prosecutor, Michael Morchower, testified that he had not even spoken with Morrissey until after the press conference and then had expressed no opinion on the subject. Morrissey also talked with Murray Janus who, although having no prosecutorial background, is an experienced lawyer specializing in the defense of criminal cases. Not long before the press conference, Janus told Morrissey, not that playing the tape was permissible, but that: "It sounds like a close call. Think it through and go slow. It looks like they may be trying to set you up." The third person, Raymond B. Carpenter, a respected former federal prosecutor and defense lawyer, specifically told Morrissey in the early afternoon of February 11: "Joe, you've got a problem with Local Rule 57." Morrissey's response to that remark was to hang up on Carpenter without pursuing the issue further.

After receiving Comey's February 11 letter, Morrissey also discussed the question with four lawyers in his office, Messrs. Massie, Muzi, Maloney and Hershner. All, but Muzi (who had served as an intern in a state prosecutor's office), were equivocal in their comments. Muzi thought there was "no problem with Rule 57."

According to Bates, Morrissey released Buerkley's videotaped testimony to the media to shake other witnesses, or, as Morrissey put it to Bates, to "rock their world." Morrissey testified at trial that his motive for releasing the testimony was to induce other witnesses to come forward. That, of course, is exactly the opposite result which was apprehended by Bates, Morrissey's investigator, when he asked Morrissey not to release the videotape to the media. The record leaves no doubt that one of Morrissey's motives was to rattle the witnesses and thereby to affect the testimony they would give. Another motive was to level the playing field with respect to publicity about Harris and the case. [2]

On February 12, the Honorable James R. Spencer, the presiding judge in *United States v. Harris*, issued Show Cause Order No. 1, pursuant to 18 U.S.C. § 401(3). It charged Morrissey with:

> willfully, intentionally and contumaciously violating Local Criminal Rule 57(C) ... by holding a press conference to discuss a prospective government witness, by distributing a press release concerning the same witness, and by displaying and distributing a videotaped statement by that witness in which the witness allegedly disavowed incriminating information supplied to the government concerning Mr. Morrissey's client, Joel Walker Harris.

On February 19, Judge Spencer set the trial of *United States v. Harris* for April 2. At that hearing Judge Spencer stated:

---

[2] That was an admitted motive in the publicity war waged by Morrissey while the state court proceedings were pending. It is fair to infer that a similar motive attended the comments Morrissey gave in the federal case.

> Let me say this, since we may not have a face-to-face on Friday. Mr. Harris has been charged with some relatively serious offenses, and if he is found guilty, the sentences are such that his life can be destroyed. It is obviously an important matter to him. And it is my job to see that Mr. Harris gets a fair trial. And that's why we have the rules that we have and that's why I filed this order to show cause. Because there is some indication that the rules may have been violated.

I want it understood here on out that this case will not be tried in the media. It will be tried in this Court. And any infractions of that admonition will be met with a harsh result. Thank you very much.

GX 21.

On March 4, 1997, a superseding indictment was issued in *United States v. Harris* and Judge Spencer set the trial for April 14, 1997. On April 1, 1997, a second superseding indictment was issued. On that date, Morrissey gave an interview to a newspaper reporter. The newspaper article is GX 23. The parties have stipulated that the article accurately recites the statements therein attributed to Morrissey. In that article, Morrissey said that "the charges [against Harris] never should have been filed" and that "if the charges had come up when he [Morrissey] headed the [state] prosecutor's office, we would have laughed it out of court." At trial, these were found to be comments on the merits of the case.

On April 9, 1997, Show Cause Order No. 2 was issued. It charged Morrissey with "willfully, intentionally and contumaciously violating Local Rule 57(C) ... by his comments on April 1, 1997 to reporters ... about the merits of the prosecution of *United States v. Harris.*"

It is in this factual context that Morrissey's First Amendment rights allegedly were infringed by the institution of charges for violation of Local Rule 57(C). And, it is in this actual context that Morrissey's challenge to the application of that rule to his speech must be assessed.

## III. DISCUSSION

Morrissey's challenge to Local Rule 57(C) is that its strictures on a lawyer's freedom of speech are not sufficiently narrow to pass scrutiny under the First Amendment as interpreted in *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). In particular, Morrissey asserts that, under *Gentile,* a speech-restricting rule of the sort here at issue can pass constitutional muster only if it prohibits lawyer comments to the press that present a "substantial likelihood of materially prejudicing an adjudicative proceeding" (the "substantial likelihood standard"). Put another way, Morrissey argues that Local Rule 57(C) is constitutionally defective because it prohibits dissemination of lawyers' statements "if there is a reasonable likelihood that such dissemination would interfere with a fair trial or otherwise prejudice the due administration of justice" (the "reasonable likelihood standard").

As a threshold matter, the United States argues that Morrissey has waived any right to challenge the constitutionality of the rule. On the merits, the United States asserts that Local Rule 57(C) is constitutionally adequate.

### A. The Waiver Argument

[1] Morrissey agreed to abide by Local Rule 57(C) when he was admitted to practice in this Court in 1987, and again in 1996, when he was readmitted to practice in this Court following his reinstatement to practice upon completion of the period of suspension of his law license

imposed by the state. [3] Those agreements, argues the United States, constitute the waiver of any right Morrissey may have had to challenge the constitutionality of the rule.

In support of its position, the United States relies upon *Wilkinson v. Legal Services Corp.*, 80 F.3d 535 (D.C.Cir.1996), wherein the District of Columbia Circuit applied classic principles of equitable estoppel to preclude an agency employee from challenging, as constitutionally impermissible, the composition of the management board of his employing agency. The rationale for the decision was that the appellant had been employed and compensated for almost two years by the very management group which he alleged to have been unconstitutionally appointed. *See also Robertson v. FEC*, 45 F.3d 486 (D.C.Cir.1995) (precluding, by equitable estoppel, a constitutional challenge to the composition of the Federal Election Commission by a presidential candidate who had accepted funds from the FEC).

Morrissey's agreements to abide by the Local Rules do not equate to an estoppel of the sort at issue in *Wilkinson* or *Robertson*, on which *Wilkinson* was based. Moreover, it is settled that a lawyer may challenge the constitutionality of a rule in a proceeding to determine whether he has violated it. *See In re Oliver*, 452 F.2d 111 (7th Cir.1971). [4]

---

[3] Under the Local Rules, suspension of a lawyer's license to practice by the state automatically results in withdrawal of the privilege to practice in this Court. Morrissey's license to practice was suspended by Virginia on November 7, 1994 and his privilege to practice in this Court was withdrawn until Morrissey's state suspension was completed on May 7, 1996. He was readmitted to practice in this Court on May 21, 1996.

[4] The same is not true of an order, however. *United States v. Cutler*, 58 F.3d 825 (2d Cir.1995) (applying the collateral bar doctrine to preclude a constitutional challenge to a gag order). This case does not involve such an order.

**B. The Constitutional Challenge to Local Rule 57(C)**

[2] Local Rule 57(C) is substantially identical to Disciplinary Rule 7-107(B) ("DR 7-107(B)"), the constitutionality of which was measured by the Fourth Circuit in *Hirschkop v. Snead,* 594 F.2d 356 (4th Cir.1979). In *Hirschkop,* a lawyer brought a declaratory judgment to void the adoption of DR 7-107(B) by the Supreme Court of Virginia on the ground that the rule unconstitutionally restricted lawyers' comments about pending litigation in violation of the First and Fourteenth Amendments.

The Fourth Circuit began its analysis of the constitutional issue by explaining that "[s]tate and federal courts have a substantial interest in assuring every person the right to a fair trial, a right which the Supreme Court has described as 'the most fundamental of all freedoms,' " and that this right could often be impaired by "lawyers' unrestrained, prejudicial comment pending trial." 594 F.2d at 363-64 (citations omitted). Upon that reasoning, the Fourth Circuit held that DR 7-107(B) furthered " 'an important or substantial governmental interest unrelated to the suppression of expression,' " thereby satisfying the first part of the test set by *Procunier v. Martinez* for assessing the constitutionality of governmental restrictions on speech. *Hirschkop,* 594 F.2d at 363-64 (*quoting Procunier v. Martinez,* 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974)).

The Court of Appeals then turned its attention to the second aspect of the test in *Procunier:* whether the restrictions imposed by DR 7-107(B) were unnecessarily broad, or whether a less intrusive means of assuring the fundamental right to a fair trial was adequate. *Id.* at 364-65. [5] Like Local Rule 57(C), the rule in *Hirschkop* contained six

---

[5] Having surveyed the history of earlier disciplinary rules regulating extrajudicial comments by lawyers, the Fourth Circuit explained that the express prohibitions in DR 7-107(B) on six categories of speech were a

enumerated topics as to which extrajudicial statements were expressly prohibited during the pendency of criminal proceedings. And, like Local Rule 57(C), DR 7-107(B) did not, in the subsection setting forth the six categories of restricted speech, expressly articulate a standard against which to measure whether the making of statements on those six specific topics was permissible.

After observing that the "express provisions of the rule [DR 7-107(B)] are not explicitly qualified," the Court of Appeals concluded that "[s]ince ... one may imagine some situations which ought not to result in the filing of charges, some qualification is necessary." *Id.* at 367-68. The constitutionally requisite qualifications were located by examining the rule as a whole. In that respect, the Fourth Circuit held that:

> It is obvious from a reading of the *entire rule* that the drafters were *concerned with speech for publication which had a reasonable likelihood of interference with a fair* trial. It does not strain the language of the rule to treat that *qualification* as *implicit in each of the [six] categories.*

*Id.* at 368 (emphasis added).

Having determined that each of the six express prohibitions of DR 7-107(B) was qualified by the "reasonable likelihood of interference with a fair trial" standard, the Court of Appeals then considered whether the standard was sufficiently protective of lawyer speech to

---

replacement for more vague and generalized rules which had not provided adequate guidance to lawyers respecting the kinds of extrajudicial statements which were prejudicial to the integrity and fairness of judicial proceedings. *Id.* at 365-67.

satisfy the First Amendment. On that critical point, the Court of Appeals held that:

> If some qualification of expressed prohibitions is necessary, however, we find no basis for a conclusion that the Constitution of the United States requires a tighter standard than that implicit in the rules themselves. The only reason for any qualification at all is to take care of the unusual case in which, because of extraordinary circumstances, there is no likelihood of a prejudicial effect.... Thus, we are not certain that any clear and present danger or serious and immediate harm test would be met, and we see no reason for injecting into the rules the uncertainties which the imposition of one or both of those standards would occasion....

*Id.* at 368. Moreover, the Court held that one of the virtues of the rules was that:

> They tell the lawyers what they may publicize as well as what they may not. *With the reasonable likelihood of interference qualification, the rules seem to be as definite as any set of rules may be.* The clarity of their guidance is marked. But the injection of any other standard would make the prohibition, which is now clear and definite, to some extent unclear and gray. The reason for the injection of any qualification at all does not require that result as a matter of constitutional doctrine.

*Id.* (emphasis added).

Finally, the Fourth Circuit held that "[n]o heavier or stiffer standard than the reasonable likelihood test is needed to protect [lawyers] from disciplinary sanctions for speech for publication without adequate notice of the consequences." *Id.* at 369. Thereupon, the Court of Appeals rejected the challenge to DR 7-107(B) as applied to criminal jury proceedings.

Fourteen years after *Hirschkop,* the Supreme Court of the United States considered the constitutionality of a disciplinary rule which barred lawyers from making extrajudicial statements that would have a "substantial likelihood of materially prejudicing an adjudicative proceeding." *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1060, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). The rule in *Gentile,* unlike Local Rule 57(C), did not set forth explicit prohibitions on certain categories of speech, but instead listed, in an advisory fashion, categories of statements which would likely have such a prejudicial effect, and which thus would be in violation of the disciplinary rule.

The decision in *Gentile,* of course, must be considered in perspective of the issues presented to the Supreme Court for decision. The lawyer insisted that rules, such as Local Rule 57(C), restricting lawyer speech must conform to the demanding standard set in *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) for suppressing press commentary on evidence during pending criminal proceedings. [6] The Nevada rule, applying the "substantial likelihood of material prejudice" standard, set far less demanding standards for regulating lawyer speech. The Supreme Court declined to apply to the speech of lawyers

---

[6] In *Nebraska Press Ass'n,* the Court held that to "suppress press commentary on evidentiary matters, the State would have to show that 'further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court.' " *Gentile,* 501 U.S. at 1065 (*quoting Nebraska Press Ass'n,* 427 U.S. at 569).

the extremely strict test it had set for regulating comments by the press. In so holding, Chief Justice Rehnquist explained that:

> Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct.... Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authorative.

*Gentile*, 501 U.S. at 1074.

The Chief Justice also emphasized that: "[f]ew, if any interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Gentile*, 501 U.S. at 1075. Then, the Chief Justice particularized the high cost to society occasioned by abridgement of the right to a fair trial by an impartial jury when extrajudicial lawyer comments exceeded appropriate bounds. The articulated toll included the need for new trials, for change of venue, for extensive voir dire examination, and the fact that extensive jury examination of change of venue often could not cure the damage caused by extrajudicial statements of lawyers. *Id.* Consequently, "[t]he State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and the litigants." *Id.*

[3] As *Gentile* makes clear, the limitations imposed by speech-restrictive rules, such as Local Rule 57(C), aimed at

achieving that end are directed to "two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found." *Gentile*, 501 U.S. at 1075. And, in achieving those objectives, all speech-restrictive rules must be "narrowly tailored" so as to avoid an impermissible intrusion on the First Amendment rights of lawyers. *Id.* The Nevada rule under consideration in *Gentile* was found to be narrowly limited because it only applied to speech that was substantially likely to have a materially prejudicial effect, it was neutral as to points of view, it applied equally to all attorneys participating in a pending case, and it merely postponed the attorneys' comments until after the trial. *Id.* at 1076.

It is true, as Morrissey argues, that the plurality opinion, authored by the Chief Justice, held that the " 'substantial likelihood of material prejudice' standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials." *Gentile*, 501 U.S. at 1075. [7]

---

[7] Justice Kennedy delivered the opinion of the Court with respect to the petitioner's "void for vagueness" challenge to a safety valve provision of the Nevada disciplinary rule. Although Morrissey's brief makes passing reference to the void for vagueness part of *Gentile*, it does so only in discussing the standard. Morrissey's constitutional challenge to Local Rule 57(C) is not predicated on the void for vagueness aspect of *Gentile*. Such a challenge, of course, would be ineffective because of the difference in the two rules.

> Justice Kennedy also issued an opinion addressing the constitutionality of the "substantial likelihood of material prejudice" standard, in which three other justices joined. Justice Kennedy commented that although the current case was a "poor vehicle for defining with precision the outer limits under the Constitution of a court's ability to regulate an attorney's statements about ongoing adjudicative proceedings," at the very least, the rule under consideration represented

And, it is correct that Justice O'Connor, who joined the opinion on this issue in a separate concurrence, similarly concluded that the " 'substantial likelihood of material prejudice' standard ... passes constitutional muster.' " *Gentile*, 501 U.S. at 1082.

However, Morrissey is incorrect in asserting that *Gentile* means that the only constitutionally acceptable standard is the one reflected in the Nevada rule and approved in *Gentile*. To the contrary, *Gentile* did not evaluate the constitutional adequacy of the other standards of which the Court took note, including the reasonable likelihood standard in DR 7-107(B) which, as the Court stated, was then in effect in 11 states. *See Gentile*, 501 U.S. at 1068. Nor is Morrissey's interpretation of *Gentile* proved by the comment in *Gentile* that the reasonable likelihood standard is "less protective of attorney speech" than is the Nevada rule. *Id.* Morrissey's position fails ultimately because it ignores the rationale which *Gentile* employed to evaluate restrictions on extrajudicial lawyer statements during the pendency of criminal proceedings. When measured against the reasoning upon which *Gentile* was decided, Local Rule 57(C) also passes constitutional muster.

First, *Gentile* teaches that rules restricting lawyer speech must only "impose narrow and necessary limitations on lawyers' speech." *Gentile*, 501 U.S. at 1075. The restrictions here at issue are both narrow and necessary. This is underscored by the fact that the six categories of prohibited speech in Local Rule 57(C) closely track a similar list given by the Supreme Court of the United States as speech that likely will cause prejudice in an adjudicative proceeding. *See Gentile*, 501 U.S. at 1076; *Sheppard v.*

---

"a limitation of First Amendment freedoms greater than is necessary or essential to the protection of the particular governmental interest, and does not protect against a danger of the necessary gravity, imminence or likelihood." *Id.* at 1057-58.

*Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). For instance, in *Sheppard*, the Supreme Court held that the trial court could have taken preemptive action to prevent the resulting prejudice to the defendant's trial by:

> proscrib[ing] extrajudicial statements by any *lawyer*, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation to take any lie detector tests; any statement made by Sheppard to officials; *the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence;* or *like statements concerning the merits* of the case.

384 U.S. at 361 (emphasis added). The underscored text, of course, is substantially identical to that in subsections (4) and (6) of Local Rule 57(C).

Second, the limitations on lawyer speech must be aimed at the principal evils which threaten the integrity and fairness of the judicial system. *Gentile*, 501 U.S. at 1075. Two of those evils are lawyers': "(1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire even if an untainted panel can be found." *Id.* Here, Morrissey was cited for speech which went to two of those six topics: the identity, testimony or credibility of a witness (and one whom Morrissey himself considered to be a key witness in the pending case), and the expression of a lawyer in the case about the merits of the case. It is beyond serious question that comments of that sort "are likely to influence the actual outcome of the trial" and "are likely to prejudice the jury venire, even if an untainted panel can ultimately be found." *Gentile*, 501 U.S. at 1075.

Third, speech restrictions which prevent lawyers, as officers of the courts, from imposing on the judicial system

and the litigants the unacceptable costs outlined in *Gentile* are permissible only if they are "narrowly tailored to achieve those objectives." *Id.* [8] Narrow tailoring must include provisions which render the rule neutral as to points of view, which make the rule apply equally to all attorneys practicing in a pending case, and which merely postpone lawyer comments until after the trial. Local Rule 57(C), like the rule under scrutiny in *Gentile,* satisfies each of those benchmarks of constitutionally adequate protection.

Moreover, Local Rule 57(C) is actually more narrowly drawn than the Nevada rule because the rule here identifies six specific topics, themselves rather limited, as to which the proscription against lawyer speech attaches. And, the reasonable likelihood limitation applies to each of these six specific proscriptions as if it were articulated in each of them. *Hirschkop,* 594 F.2d at 367-68. The speech prohibited by the Nevada rule was defined only as that which "the lawyer knows or reasonably should know ... will have a substantial likelihood of materially prejudicing an adjudicative proceedings." The Nevada rule also provided an advisory list of speech which might offend the substantial likelihood standard, but the rule left the ultimate assessment on that point to the subjective judgment of the lawyer.

Unlike the rule in *Gentile,* Local Rule 57(C) provides lawyers with explicit and fully adequate notice of the kind of speech which is proscribed. As to each proscribed topic, the reasonable likelihood of prejudice standard ensures that lawyers are not sanctionable for technical violations of the rule in which there is no likelihood of prejudicial effect.

---

[8] See supra pp. 538-539. The objectives to be achieved are the avoidance of the costs of changing venue, extraordinary voir dire procedures, the difficulty of seating an impartial jury even after probing voir dire, and the inherent prejudicial difficulty in disinfecting criminal trials of the substance of extrajudicial statements. *Gentile,* 501 U.S. at 1075-76 (*citing Sheppard v. Maxwell,* 384 U.S. 333, 350-51, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Turner v. Louisiana,* 379 U.S. 466, 473, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965)).

*Hirschkop*, 594 F.2d at 368. Taken together, the express specification of proscribed topics and the reasonable likelihood standard afford a constitutionally adequate level of protection for lawyer speech respecting pending criminal proceedings.

In sum, Local Rule 57(C)(4) and (6) impose restraints on lawyer speech that are narrowly tailored to achieve precisely the objectives to which the Supreme Court in *Gentile* held that such restrictions properly may be directed. Moreover, Local Rule 57(C) explicitly prohibits extrajudicial statements which have long been recognized as presenting the greatest risk of prejudice in an adjudicative proceeding, and only sanctions those statements which are reasonably likely to have that effect. Hence, like the rule at issue in *Gentile*, Local Rule 57(C) strikes a permissible balance between (1) the societal interest in upholding the fundamental right of the litigants to an impartial jury and to a fairly conducted adjudicative proceeding, and (2) the free speech rights of lawyers who are operating within the system whose central tenet is the fundamental right those restrictions are designed to achieve.

The Fourth Circuit has not spoken on the subject since *Hirschkop*. There is scant authority on this issue in other circuits since *Gentile* was decided. However, four years after *Gentile*, the Second Circuit considered the constitutionality of the "reasonable likelihood of prejudice" standard as applied to an attorney disciplinary rule in *United States v. Cutler*, 58 F.3d 825 (2d Cir.1995). In *Cutler*, the court addressed the constitutionality of a local disciplinary rule similar to Local Rule 57(C) which: (1) prohibited speech "if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice," and (2) then enumerated several specific categories of forbidden speech without repeating the "reasonable likelihood" standard.

The Second Circuit cited *Hirschkop* as interpreting rules of that sort (such as DR 7-107, the rule in *Hirschkop* ) so that

speech in each of the six prohibited categories was restricted only if it met the "reasonable likelihood standard" because the court saw "no need to adopt an interpretation of [the local rule] that might offend the Constitution." *Cutler*, 58 F.3d at 835. Although the Second Circuit noted *Gentile*, it did not discuss the Supreme Court's reference to the "reasonable likelihood" standard as one less protective than the "substantial likelihood of material prejudice" standard at issue in *Gentile*, nor did the Second Circuit consider the "reasonable likelihood" standard to be constitutionally infirm. *See Cutler*, 58 F.3d at 836-37. Hence, *Cutler* instructs that *Hirschkop* is consistent with *Gentile* and with the interpretation of Local Rule 57(C) as a constitutionally adequate restriction of lawyer speech in pending criminal cases.

## IV. CONCLUSION

With knowledge of Local Rule 57(C), Morrissey willfully, deliberately, and contumaciously violated it on February 11. In the same frame of mind, he did so again on April 1 after having received one citation for contempt and after having been admonished by a judge of this Court to act in conformity with Local Rule 57(C) and not to try the case in the press.

The rule in its entirety, and the two parts of it which Morrissey violated, are intended to secure a fair trial by an impartial jury. The comments by Morrissey clearly fall within the definition of the principal evils sought to be avoided by speech-restrictive rules because it was reasonably likely that the comments would influence the outcome of the trial and prejudice the venire, even if an untainted panel could be found. The restrictions imposed by Local Rule 57(C) are both necessary and narrow in scope.

For the reasons explained above, the reasonable likelihood of interference with a fair trial standard passes constitutional muster. Accordingly, the Motion to Dismiss the Show Cause Orders is DENIED.

The Clerk is directed to send a final copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

It is so ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-4168
Misc - 97-16

In Re: Joseph D. Morrissey
Appellant

FILED: March 10, 1999
ENTERED: March 10, 1999

---

On Petition for Rehearing and Rehearing En Banc

---

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

IT IS FURTHER ORDERED that appellant's motion to withdraw his petition for rehearing and rehearing en banc is denied as moot.

Entered at the direction of Judge Ervin, with the concurrence of Judge Hamilton and Judge Moon, United States District Judge sitting by designation.

For the Court,

/s/ Patricia S. Connor
CLERK

## LOCAL CRIMINAL RULE 57(C) OF THE UNITED DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

(A) Potential or Imminent Criminal Litigation: In connection with pending or imminent criminal litigation with which a lawyer or a law firm is associated, it is the duty of that lawyer or firm not to release or authorize the release of information or opinion (1) if a reasonable person would expect such information or opinion to be further disseminated by any means of public communication, and (2) if there is a reasonable likelihood that such dissemination would interfere with a fair trial or otherwise prejudice the due administration of justice.

. . . .

(B) Pending Criminal Proceedings--Specific Topics: From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the termination of trial or disposition without trial, a lawyer or a law firm associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement which a reasonable person would expect to be further disseminated by any means of public communication, if such statement concerns:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the

accused's name, age, residence, occupation, and family status and, if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his or her apprehension or to warn the public of any dangers such person may present;

(2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

. . . .

(D) Pending Criminal Proceedings--General: During a jury trial of any criminal matter, including the period of selection of the jury, no lawyer or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview relating to the trial or the parties or issues in the trial, which a reasonable person would expect to be disseminated by means of public communication, if there is a reasonable likelihood that such dissemination will interfere with a fair trial, except that the lawyer or law firm may quote from or refer without comment to public records of the Court in the case.